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No. _____

In The
Supreme Court of the United States
October Term, 1998

DEREK DUANE PAGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED

I. Whether a defendant violates the Interstate Domestic Violence Statute, 18 U.S.C.§2261(a)(2), merely by traveling across state lines with the victim after the defendant physically assaults the victim in the privacy of the defendant's own home.

A. Whether a "bodily injury", as that term is used in 18 U.S.C. §2261(a)(2), includes the natural progression of an injury inflicted prior to interstate travel.

B. Whether verbal threats alone, without any further physical acts of violence, constitute a "crime of violence" as that term is used in the Interstate Domestic Violence Statute, 18 U.S.C. §2261(a)(2).

C. Whether the clause "in the course or as a result of that conduct," as contained in the Interstate Domestic Violence Statute, 18 U.S.C.§2261(a)(2), refers to the interstate transportation, or whether it instead refers to the force, coercion, duress, or fraud, occurring prior to interstate transportation.

II. Whether, in light of this Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), the Interstate Domestic Violence offense contained in the Violence Against Women Act of 1994, and codified at 18 U.S.C.§2261(a)(2), on its face and as applied, exceeds the Federal Government's power under the Commerce Clause. (U.S. Const. art I, §8, cl.3).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The *En Banc* opinion of the Court of Appeals (App., *infra*, A) is reported at 167 F. 3d 325 1999 U.S. App., Lexis 2696; 1999 FED App., 0066P (6th Cir.). The opinion of the three judge panel for the Sixth Circuit Court of Appeals (App., *infra*, D) is reported at 136 F. 3d 481. The opinion of the District Court denying the motion for acquittal is attached hereto at App., *infra*, F.

JURISDICTION

The judgement of the Court of Appeals was entered on February 23, 1999, (App., *infra*, A). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United States Constitution, the Violence Against Women Act of 1994, and Title 18 are set forth in the attached Appendix.

STATEMENT

On November 2, 1995, a federal grand jury returned a two count indictment charging Derek D. Page with kidnapping and interstate domestic violence. His first trial ended in a hung jury. However, at Page's second trial, the jury acquitted him of kidnapping, but found him guilty of interstate domestic violence, in violation of 18 U.S.C. §2261(a)(2) (App., *infra*, D). The evidence at trial indicated that on the evening of July 24, 1995, the victim, Carla Scrivens, visited Derek Page's home in Columbus, Ohio. While visiting at the home, a physical confrontation ensued, and evidence was presented to show that Derek Page sprayed Scrivens with pepper spray and beat her over the course of several hours with his fists, a hammer, and a pipe wrench (App., *infra*, D). It is undisputed that the attack occurred entirely within Mr. Page's own home.

Several hours later, Derek Page drove Ms. Scrivens to Washington, Pennsylvania where he left her in the emergency room of a hospital. Evidence was further presented at trial to indicate that Derek Page made threats to Ms. Scrivens during the course of the interstate transportation (App., *infra*, D). Evidence was also introduced to show that the injuries suffered by Ms. Scrivens while in the home of Derek Page, worsened during the interstate transportation. Id. However, the evidence also established that the worsening of Ms. Scrivens' injuries

were not the result of any further physical confrontation with Derek Page, but was instead a result of the natural progression of her medical condition through further bleeding and swelling. Id.

Upon his conviction, Derek Page filed a motion for judgement of acquittal pursuant to Criminal Rule 29(C). On July 15, 1996, the trial court denied Derek Page's motion for judgment of acquittal (App., *infra*, F). In rejecting Derek Page's argument regarding statutory interpretation, the trial court never discussed the definition of the term "bodily injury" or the term "crime of violence." Id. Instead, the trial court rejected Derek Page's statutory interpretation argument by finding that the language "in the course or as a result of" included that conduct that occurred in Derek Page's own home prior to any interstate transportation (App., 4 infra, F). The trial court then summarily rejected Derek Page's argument regarding the Commerce Clause by finding that Congress had a "rational basis for concluding that the regulated activity--domestic violence--substantially affects interstate commerce." (App., *infra*, F).

After the trial court rejected Derek Page's statutory and constitutional arguments set forth in his motion for judgment of acquittal, the trial court sentenced Derek Page to serve fifty-seven months in Federal prison (App., *infra*, E). Derek Page then timely appealed his conviction under the Interstate Domestic Violence Statute to the Sixth Circuit Court of Appeals.

The Sixth Circuit initially reversed the decision of the trial court (App., *infra*, D). In a split decision, the three judge panel, filing three separate opinions, reversed the trial court remanding the case for yet a third jury trial on the charge of interstate domestic violence under 18 U.S.C.§2261(a)(2). The three judge panel reversed the decision of the trial court based on Derek Page's initial assignment of error relating to the interpretation of the Domestic Violence Statute.

However, the decision of each individual Judge was distinct in its analysis and its application of the statutory language (App., *infra*, D). Because the case was reversed and remanded based solely on the issues of statutory interpretation, the three judge panel never formally determined the issues raised regarding the Commerce Clause. Id. The Sixth Circuit Court of Appeals then vacated the decision of the three judge panel and granted the United States Attorney's petition for rehearing En Banc. 143 F. 3d 1049 (1998).

On February 23, 1999, the Sixth Circuit, upon rehearing En Banc, issued an evenly split decision which, by operation of the eight to eight vote, affirmed Derek Page's conviction and sentence "as is customary under such circumstances" where a rehearing En Banc results in an equally divided vote among the court members (App., *infra*, A). Again, the rehearing En Banc resulted in several diverse opinions that employed different forms of analysis in the

determination of both the statutory interpretation issues and the Commerce Clause issues raised by Derek Page upon his appeal. Id. The diversity of the opinions rendered by the En Banc panel did little to eliminate the confusion surrounding the interpretation of the domestic violence statute and the constitutionality of the statute, both facially and as applied to particular defendants, under the Commerce Clause.

Ten days later, on March 5, 1999, the Fourth Circuit, also upon a rehearing En Banc, declared the Violence Against Women Act to be unconstitutional under the Commerce Clause in the case of *Brzonkala v. Virginia Polytechnic Inst.*, 132 F. 3d 949, (4th Cir. 1997). Thus, a split between the Circuits has now arisen regarding the constitutionality of the Violence Against Women Act. Although *Brzonkala, supra*, involved a civil action, as opposed to a criminal prosecution, the divergent opinions between the Circuits have created a split of precedential authority both as to the constitutionality of the Violence Against Women Act itself, and, perhaps more importantly, as to the tests to be applied when determining whether any legislation or the application of that legislation violates the Commerce Clause.

REASONS FOR GRANTING THE PETITION

I. This case offers the court an opportunity to make an early and definitive statement about the scope and application of the Interstate Domestic Violence statute, 18 U.S.C. §2261(a)(2).

This Court has traditionally granted Certiorari on issues of statutory construction when those issues are significant to the administration of the statute. See, e.g., *United States v. Ruzicka*, 329 U.S. 287. Furthermore, this Court has traditionally granted Certiorari on issues of statutory interpretation that are important questions of first impression under the statute. *American Federation of Musicians v. Wittstein*, 379 U.S. 171. In such cases, an early and definitive ruling defining the scope of the statutory terms is required by the court. *Laing v. United States*, 423 U.S. 161.

This case offers the Court the opportunity to resolve deep confusion about what actions violate the Interstate Domestic Violence Statute, 18 U.S.C. §2261(a)(2). The Sixth Circuit, in both a panel opinion and *En Banc* disagreed significantly on how to interpret several provisions of the statute. The confusion in the courts below is of grave significance to the administration of the statute. Furthermore, given the fact that the Violence Against Women Act was only enacted in recent years, this case

raises statutory interpretation issues of first impression. The Court is therefore presented with an opportunity to make an early and definitive statement on the statute and to guide the lower courts in its application. The question before the Court is this: Whether a defendant violates the Interstate Domestic Statute, 18 U.S.C.§2261(a)(2), merely by traveling across state lines with the victim after the defendant physically assaults the victim in the privacy of the defendant's own home. In attempting to answer this question, the Sixth Circuit, in its several opinions, differed significantly in its interpretation of the elements of the statute.

The confusion in the Sixth Circuit resulted from the conflicting interpretations of several provisions of the statute. First, members of the lower court disagreed about the interpretation of the "bodily injury" element of the interstate domestic violence offense enacted under 18 U.S.C. §2261(a)(2). Some judges believed that the worsening of existing bodily injuries met the standard. However, even judges who agreed on this point differed as to what showing of causation of bodily injury was required. Some judges believed that the mere natural progression of existing injuries by failing to provide hospital care sufficed, while some required a higher standard of showing the bodily injury to be caused by an "intentional act of violence." (App., *infra*, A,D). In contrast, there were judges who interpreted "bodily injury" to not include the

progression or aggravation of pre-existing injuries, but instead requiring the infliction of a new injury while traveling across state lines (App., *infra*, A,D).

Second, the members of the Sixth Circuit came to different interpretations of what constitutes a "crime of violence," under the Interstate Domestic Violence Statute, 18 U.S.C.§2261(a)(2). Some judges believed that threats alone, unaccompanied by any physical violence, could constitute a "crime of violence," under the statute. Other judges required a physical act of violence.

Third, this Court must make an early and definitive ruling regarding the scope of the jurisdictional element contained in the Interstate Domestic Violence Statute, 18 U.S.C.§2261(a)(2). In other words, this Court must define the scope of the language in the statute requiring the crime of violence and the resulting bodily injury to occur "in the course or as a result of that conduct." Some judges believe that the term "that conduct" referred to crossing of a state line; other judges believed that the term "that conduct" referred more expansively to the force, coercion, duress, or fraud, done *with the intent* to cause interstate travel; while a third group believed that the term "that conduct" referred to the force, coercion, duress, or fraud, that *enabled* interstate travel, regardless of whether the defendant *intended* to travel interstate upon commencing the conduct. The difference is significant to the application of the statute because under the first interpretation, the "crime of

violence" that causes "bodily injury" must occur during interstate travel. The second interpretation expands the time frame for evaluating a defendant's conduct, but requires the prosecution to prove that the defendant undertook his conduct towards the victim with the intent to subsequently travel across state lines. The third interpretation is the most expansive because it reaches conduct that occurs wholly within one state as long as that conduct has some relation to later travel across state lines, regardless of whether the defendant intended to travel interstate when embarking upon his course of conduct (App., *infra*, A,D).

These three varied interpretations of the "in the course or as a result of that conduct" language is particularly troublesome when one considers the fact that members of the Sixth Circuit have also provided multiple interpretations of the "bodily injury" element and the "crime of violence" element. Therefore, lower courts are not adequately guided about whether the"crime of violence" and the resulting "bodily injury" must occur during or after the interstate transportation or whether those elements may occur prior to the interstate transportation for the purposes of satisfying the jurisdictional element of the Interstate Domestic Violence Statute, 18 U.S.C.§2261(a)(2) (App., *infra*, A,D).

Obviously, given the numerous interpretations of each particular element of the interstate domestic violence offense, numerous interpretations presently exist for the

statute as a whole. Under the most expansive interpretation of each element, the Interstate Domestic Violence Statute would criminalize an intrastate act of violence that, for example, takes place in an individual defendant's private home, so long as interstate travel eventually followed, with no real temporal or geographic limitation. Meanwhile, under the narrowest interpretation of the statute, as required by the rule of lenity, the Domestic Violence Statute would only be violated upon the perpetration of a physical act of force occurring either during or after interstate travel, that directly and proximately causes physical damage to the victim's person so that, but for the act of physical force, such foreseeable damage would not have occurred. Confusion surrounding the interpretation of the statutory elements is clearly exhibited in both the decision of the three judge panel, and in the *En Banc* decision of the Sixth Circuit Court of Appeals.

A. The Three Judge Panel

The three judge panel that first heard the case produced three opinions with three different theories about what actions violated the statute. Judge Merritt believed the statute did not reach acts of violence that occurred before interstate travel began (App., *infra*, D). Judge Merritt read the language "in the course or as a result of" as limiting the reach of the statute to violent acts that caused bodily injury

occurring during or as a result of interstate travel. Judge Merritt believed that threats could constitute a "crime of violence," but that the prosecution still bore the burden to show these threats *caused*, both directly and proximately, a subsequent "bodily injury." Judge Merritt did believe that the aggravation of injuries inflicted prior to interstate travel could constitute "bodily injury" under the statute so long as the prosecution was able to establish that the threats directly and proximately caused the aggravation of the pre-existing injury. In other words, Judge Merritt appears to require the prosecution to prove beyond a reasonable doubt that the aggravation of the pre-existing injury was foreseeable (proximate causation) and to further prove that, but for the threats by the defendant, the worsening of the victim's injuries would not have occurred (direct causation). Judge Merritt then voted to reverse the trial court and remand the matter for a third jury trial.

Judge Wellford, writing separately, concurred in Judge Merritt's holding, but concluded that threats alone could not constitute a "crime of violence" under the Interstate Domestic Violence Statute, 18 U.S.C.§2261(a)(2). Judge Wellford opined that the statute required some physical action that directly and proximately caused bodily injury during, or as a result of the forced crossing of a state line.

Judge Moore, also writing separately, disagreed significantly with Judge Merritt and Judge Wellford in their

interpretation of the statute. Judge Moore believed that the statute criminalized the forcing of an intimate partner across state lines where such transportation is integrally related to a prior beating, even if that beating occurs before transportation commences. Judge Moore believed that Page's conduct falls within the scope of the statute under two theories of liability: (1) when he beat his ex-girlfriend over the course of several hours, conduct which enabled him to force her across state lines; and (2) when he forced her to travel interstate under the threat of violence, intentionally preventing her from obtaining medical treatment, thereby allowing her pre-existing injuries to worsen over time (App., *infra*, D).

Unlike the majority, Judge Moore read the "in the course or as the result of that conduct" language to refer not just to the victim's narrow act of crossing state lines, but more generally to the batterer's conduct of force, coercion, duress, or fraud (App., *infra*, D). Judge Moore believed that the "crime of violence" that occurred inside Page's apartment was precisely what enabled Page to force the victim across state lines. Judge Moore determined that since the beating was an integral part of the forcible transportation across state lines, the "crime of violence" and the "bodily injury" inflicted in Page's home satisfied the element of the statute requiring the "crime of violence" and the resulting "bodily injury" to occur "in the course or as a result of that conduct." Consequently, as Judge Moore read

the statute, the beating that took place inside Page's home constituted interstate domestic violence under 18 U.S.C.§2261(a)(2) regardless of whether or not Page committed any further violent acts or caused any further bodily injuries. Based on this interpretation of the jurisdictional element contained within the Interstate Domestic Violence Statute, 18 U.S.C.§2261(a)(2), Judge Moore voted to affirm the conviction and sentence of Derek Page.

B. The *En Banc* Decision

The United States Attorney stated in its petition for a rehearing En Banc, "The important question of how this statute criminalizes domestic violence when there is an interstate component should not be decided for this Circuit in a fragmented decision." However, the *En Banc* opinion fails to resolve the question of what conduct is criminalized by the statute, and in fact, raises more questions about the application of the statute.

The Sixth Circuit was equally divided upon rehearing. Eight members voted to affirm the District Court, while eight members voted to reverse. The rehearing produced four opinions and a variety of interpretations of the statute.

Judge Moore was joined by seven other judges in voting to affirm Page's conviction and sentence. Judge

Moore found that the statute could be violated by an act of violence in the privacy of a defendant's home prior to any interstate travel so long as the defendant's conduct facilitated the interstate transportation (App., *infra*, A).

Judge Kennedy, joined by six other judges, dissented in the order because he did not feel the statute reached Page's criminal assault that occurred before he began interstate transportation. Judge Kennedy interpreted the "in the course or as a result of that conduct" language to apply only to the conduct of "causing a spouse or intimate partner to cross a state line." Judge Kennedy continued by declaring that he viewed the plain language of the statute as encompassing acts of domestic violence prior to interstate travel only if that violence is the same "force" that the attacker employs to cause his victim to cross state lines against her will and the attacker's purpose at the time he inflicts the injury is to transport his victim across state line (App., *infra*, A). In other words, Judge Kennedy would require the prosecution to prove beyond a reasonable doubt that acts of violence prior to interstate transportation were perpetrated with a specific purpose of using such physical force as a means of causing the crossing of a state line. Contrary to the interpretation by Judge Moore, Judge Kennedy ruled that, "Congress simply did not draft the statute to cover the situation in which an attacker first beats an intimate partner, and only later develops the intent to

transport her across state lines in order to hamstring law enforcement efforts or conceal evidence." (App., *infra*, A).

Judge Ryan wrote separately and dissented in the order. Judge Ryan did not believe Page's conduct fit into the statute because the physical violence occurred entirely in his home, before he forced her to cross the state line. Judge Ryan believed the Interstate Domestic Violence Statute, 18 U.S.C.§2261(a)(2), only covers the infliction of physical violence upon the victim "in the course or as a result of interstate travel." Furthermore, Judge Ryan disagreed with "Judge Moore's apparent willingness to affirm the defendant's conviction on the basis of the post-interstate-travel injuries Scrivens suffered, because that theory of culpability was not argued to the jury or submitted to it by the trial court in its instructions." (App., *infra*, A).

Judge Wellford wrote separately, concurring in Judge Kennedy's opinion and dissenting in the order. Judge Wellford did not agree that vague threats, without any physical violence, during the course of interstate travel, could support a conviction under the statute. Furthermore, Judge Wellford did not agree that the natural progression of pre-existing injuries left untreated could constitute a "bodily injury" under the statute. Likewise, Judge Wellford points out in his opinion that the case was neither argued by the government, nor submitted to the jury, on instructions that the jury might determine that further bodily injuries, if any,

suffered by Scrivens while in the course of interstate travel after the initial assault in Page's condominium, were sufficient to support guilt under the Interstate Domestic Violence Statute (App., *infra*, A).

Therefore, as can be seen from the split among the members of the Sixth Circuit, a clear and definitive statement is required to guide the lower courts in the interpretation and application of the Interstate Domestic Violence Statute, 18 U.S.C.§2261(a)(2). Consequently, this Court should grant the petition of Derek Page.

II. The Lower Courts Need Clarification of *Lopez*

This case offers the Court an opportunity to make a clear and definitive statement regarding the constitutionality of the Interstate Domestic Violence Statute, under the Commerce Clause, on its face and as applied to a particular defendant, and to set forth the proper test for determining the limitations imposed upon federal authority by the Commerce Clause in all such legislation.

In 1995, this Court decided the case of *United States v. Lopez*, 514 U.S. 549. Both courts and commentators have recognized the *Lopez* decision as setting forth an important limitation on federal authority under the Commerce Clause, U.S. Const. art.I, §8, cl.3. A split between the Circuits has developed regarding the constitutionality of the Violence Against Women Act of 1994 under *Lopez*. The Sixth Circuit

in the opinions below, and the Second Circuit in *United States v. Gluzman*, 154 F. 3d 49 (2nd Cir. 1998), have upheld the constitutionality of the legislation, while the Fourth Circuit in *Brzonkala v. Virginia Polytechnic Inst.*, 132 F. 3d 949 (4th Cir. 1997), determined *En Banc* that the Violence Against Women Act was unconstitutional on its face. This split in authority alone constitutes grounds for the granting of Derek Page's Petition for Writ of Certiorari. However, this case provides this Court an opportunity to set forth the tests to be used in determining the limits imposed upon federal authority by the Commerce Clause, not only in terms of the Violence Against Women Act of 1994, or the Interstate Domestic Violence Statute contained therein, but also for all criminal statutes enacted now and in the future.

A. This Court must make a clear and definitive statement regarding the constitutionality of the Violence Against Women Act under the Commerce Clause now that a split has developed among the Circuits.

In recent years, the United States Government has initiated prosecutions under the Domestic Violence Statute in a quickly growing number of cases. In its petition for rehearing *En Banc*, the office of the United States Attorney pointed out to the Sixth Circuit, that a growing number of prosecutions was occurring under the Domestic Violence

Statute, thus requiring a clear and definitive statement by the Appellate Court. In its petition for rehearing, the United States Attorney set forth cases of which it was aware involving prosecution under §2261(a)(2), the same section under which Derek Page was convicted. As of April of 1998, the time of filing by the United States Attorney's office of its petition for rehearing *En Banc*, the following cases had been prosecuted: *United States v. Hornsby,* 88 F. 3d 336 (5th Cir. 1996); *U.S. v. Bailey,* 112 F. 3d 758 (4th Cir. 1997); *U.S. v. James,* CR-96-088-PCT-EHC (D. AZ, 1996); *United States v. Steele,* CR-S-95-327 WBS(N.D. CA, 1996); *United States v. Helem,* 7:97-CR-33-1H2 (E.D. NC, 1997); *United States v. Covington,* CR-97-58 (E.D. OK, 1997); *United States v. Page,* 136 F.3d 481, 1998 WL 54382 (6th Cir. 1998); *United States v. Cree,* C4-97-39-01 (D.ND, 1997); *United States v. Olvera,* CR-S-97-358-LKK (E.D. CA, 1997); *United States v. Prue,* CR97-30042 (D.SD, 1997); *United States v. Frank,* 97-CR-269(DC) S.D. NY, 1997); United States v. Ruggles, 97-10-B (E.D. Kty. 1997); *United States v. Venecia,* CR96-449-FR (D.OR 1996); *United States v. Hendren,* 5:96CR31-V (W.D. NC, 1998); *United States v. Williams,* 2:97CR200024-001(W.D. Ark. 1998). [1]

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[1] It is unknown to petitioner how many cases have been prosecuted under 18 U.S.C. §2261(a)(2) since April of 1998.

Resolving the Commerce Clause challenge to the statutes created by the Violence Against Women Act has now become quite difficult given the diverse opinions among the Circuits. The Second Circuit in *United States v. Gluzman*, *supra*, upheld a Commerce Clause challenge to a portion of the Domestic Violence Statute. Likewise, the Sixth Circuit in the case at bar, brushed aside petitioners Commerce Clause challenge to the Domestic Violence Statute, 18 U.S.C. §2261(a)(2). However, the Fourth Circuit in *Brzonkala*, *supra*, has ruled that the civil portions of the Violence Against Women Act violate the limitations created by the Commerce Clause. The Fourth Circuit in *Brzonkala* ruled that 42 U.S. §13981 violated the Commerce Clause after engaging in a lengthy review of this Court's case law surrounding the application of the Commerce Clause to both civil and criminal legislation.

Although too voluminous to discuss in detail here, the length and complexity of the *Brzonkala* decision itself supports the notion that lower courts are in desperate need of guidance from this Court regarding the application of the appropriate Commerce Clause analysis to the Violence Against Women Act of 1994. After all, this Court has held that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belong to the laws of the States and not the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). Moreover, "[u]nder our federal system, the 'States possess primary authority for

defining and enforcing the criminal law.'" *Lopez*, *supra*, at n.3 (citing *Brecht v. Abrahamson* 507 U.S.--, 113 S.Ct. 1710, 1720 (1993)) when congress criminalizes conduct denounced as criminal by the states, it effects the "change in the sensitive relation between the federal and state jurisdiction." *Id.* (citing *United States v. Enmons,* 410 U.S. 396, 411-12, (1973)). However, the Second Circuit and the Sixth Circuit have already held that criminal statutes involving domestic relations were permissible under the Commerce Clause, while the Fourth Circuit has held that the Commerce Clause prevents Congress from creating a civil remedy for conduct that is likewise criminal in nature.

Therefore, this case provides the Court with an opportunity to make an early and definitive statement regarding the constitutionality of the Violence Against Women Act and the interstate domestic violence offense created therein. This case provides the Court the opportunity to make such a statement in light of this Court's decision in *Lopez, supra*. Furthermore, this case provides the Court with an opportunity to clarify the meaning of *Lopez* by yet again evaluating the constitutionality of a criminal statute under the Commerce Clause.

However, unlike the statute in *Lopez,* the statute in question here contains a jurisdictional element. Consequently, this case not only provides the Court with an opportunity to clarify its holding in *Lopez*, this case also provides this Court with an opportunity to guide the lower

courts in applying the appropriate Commerce Clause analysis to criminal statutes, such as Interstate Domestic Violence Statute, that contain a jurisdictional element requiring the offense to occur in the course or as a result of interstate transportation.

B. This case not only provides the Court with an opportunity to determine the constitutionality of the legislation in question, this case also provides the Court with an opportunity to set forth the tests to be applied under the Commerce Clause to all criminal statutes that contain a jurisdictional element.

Unlike the statute declared unconstitutional in *Lopez*, the Interstate Domestic Violence Statute created under 18 U.S.C.§2261(a)(2), contains a jurisdictional element requiring the offense to occur "in the course and as a result of" interstate transportation. [2] As this Court stated in *Lopez,* when a statute is noncommercial, reviewing courts must determine whether the statute in question has a jurisdictional element which would ensure, through a case-by-case inquiry, that the proscribed conduct in question substantially

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[2] As discussed at I, *supra*, some members of the lower court feel that the offense of domestic violence may occur prior to interstate transportation, which certainly would be in violation of the Commerce Clause.

affects interstate commerce. *Lopez, supra*, at 1631. Many questions remain unanswered regarding the tests to be applied when determining the constitutionality under the Commerce Clause of a statute that contains such a jurisdictional element.

For example, can a statute that contains a jurisdictional element ever be facially invalidated under the Commerce Clause, or does the presence of a jurisdictional element language alone guarantee the facial validity of any piece of legislation enacted by Congress, regardless of how broadly that language is construed? See I, *supra*. See *United States v. Wall*, 92F. 3d 1444, 1461 (6th Cir. 1996), (J. Wall dissenting).

The court in *Lopez* also stated that the criminal statute in that case, like the Interstate Domestic Violence Statute, was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez, supra* at 1630-31. Thus, another unanswered question remains: Must all federally enacted, non-commercial, criminal statutes that contain a jurisdictional element, "substantially affect" interstate commerce in order to pass constitutional under *Lopez*?[3] See *United States v. Denalli*,

---

[3] In other words, must non-commercial criminal statutes be analyzed under the Category III "substantial effect" test as *Lopez* seems to suggest.

73 F. 3d 328 (11th Cir. 1996); *United States v. Pappadopoulos*, 64 F. 3d 522 (9th Cir. 1995).

Accordingly, the question also arises about what it means to have a "substantial effect" on interstate commerce. Many courts, including the trial court in this case, have applied a "minimal nexus" test when determining whether particularly proscribed conduct has a "substantial effect" on interstate commerce. This test has been applied when reviewing the federal car jacking statute, *United States v. Johnson*, 22 F. 3d 106 (6th Cir. 1994), which in turn violates the separation of powers by allowing Congress to regulate that which it can justify in its legislative history as opposed to that which is independently determined by a court to have a "substantial effect" on interstate commerce. Therefore the question must be answered: Can a "substantial effect" on interstate commerce be shown merely by establishing a "minimal nexus" between the proscribed conduct and interstate commerce?

Likewise, depending on how those questions are answered, further questions arise regarding the issue of the interaction between the interpretation of a statute and the limits imposed by the Commerce Clause. For example, if the existence of a jurisdictional element ensures the facial validity of a criminal statute under the Commerce Clause, can a defendant challenge the *application* of that criminal statute to his particular conduct? See *Pappadopoulos, supra;*

Denalli, supra. This case gives this Court an opportunity to address these issues early and decisively.

Under *Lopez*, lower courts are confused as to the precise test to be applied when evaluating all criminal statutes under the Commerce Clause. This confusion is heightened in cases that involve criminal statutes containing a jurisdictional element. Therefore, this Court should take the opportunity to make a clear and definitive statement as to not only the constitutionality of the Violence Against Women Act, and not only as to the constitutionality of particular interstate domestic violence offense contained in 18 U.S.C. §2261, but in a greater sense, to set forth the analysis to be employed by lower courts in determining the constitutionality of both the enactment and application of all criminal statutes under the Commerce Clause.

CONCLUSION

For the reasons set forth herein, the petition of Derek Duane Page for a Writ of Certiorari should be granted.

Respectfully submitted,

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MAY 1999

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PER CURIAM, EN BANC, FINAL OPINION

Sixth Circuit Case Nº. 96-4083
Filed February 23, 1999

Pages A-1 thru A-52

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEREK DUANE PAGE,

Defendant-Appellant.

No. 96-4083

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 95-00146—Susan J. Dlott, District Judge.

Argued: September 23, 1998
Filed: February 23, 1999

Before: MARTIN, Chief Judge; MERRITT, KENNEDY, WELLFORD, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Thomas M. Tyack, TYACK, BLACKMORE & LISTON, Columbus, Ohio, for Appellant. Deborah A. Solove, OFFICE OF THE U.S. ATTORNEY, Columbus, Ohio, for Appellee. **ON BRIEF:** Thomas M. Tyack, TYACK, BLACKMORE & LISTON, Columbus, Ohio, for Appellant. Deborah A. Solove, OFFICE OF THE U.S. ATTORNEY, Columbus, Ohio, for Appellee.

ORDER

PER CURIAM. The en banc court is equally divided in this case. Eight members of the court[1] favor affirmance of the district court and join in Judge Moore's concurring opinion (pp. 3-23). Seven members of the court[2] agree with Judge Kennedy's dissent (pp. 24-28) and would

[1]Chief Judge Martin and Judges Boggs, Siler, Daughtrey, Moore, Cole, Clay, and Gilman.

[2]Judges Merritt, Kennedy, Wellford, Nelson, Norris, Suhrheinrich, and Batchelder.

reverse; Judge Ryan, writing separately (p. 29), would also reverse; Judge Wellford would reverse for the reasons stated in his separate opinion (pp. 30-34) as well as those stated in the opinions of Judges Kennedy and Ryan. Hence, as is customary under such circumstances, the appellant's conviction and sentence are affirmed by an equally divided vote.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

CONCURRENCE

KAREN NELSON MOORE, Circuit Judge, concurring in the order. As a response to the "escalating problem of violence against women" and in recognition of the severe toll such crimes have on our society in terms of "health care, criminal justice, and other social costs," Congress enacted in 1994 the Violence Against Women Act ("VAWA" or the "Act"). S. REP. NO. 103-138, at 37, 41 (1993) (proposed VAWA of 1993); *see* Pub. L. No. 103-322, 108 Stat. 1796, 1902-55 (1994). Among numerous other provisions, the Act criminalized interstate domestic violence and interstate violation of protection orders. *See* VAWA § 40221(a), 108 Stat. at 1926-31, 18 U.S.C.§§ 2261, 2262. While Congress was particularly concerned with those crimes that "disproportionately burden women," S. REP. NO. 103-138, at 37, the criminal provisions are gender-neutral, and enforcement has been gender-neutral as well. *See, e.g., United States v. Gluzman*, 953 F. Supp. 84 (S.D.N.Y. 1997) (upholding the indictment of a wife for the murder of her estranged husband in violation of 18 U.S.C. § 2261), *aff'd*, 154 F.3d 49 (2d Cir. 1998).

Derek Page, the defendant in this case, was convicted under 18 U.S.C. § 2261(a)(2), which makes it illegal for any person to "cause[ ] a spouse or intimate partner to cross a State line . . . by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commit[ ] a crime of violence and thereby cause[ ] bodily injury to the person's spouse or intimate partner."[3] On appeal, he raises the questions whether physical violence

---

[3]The full text of § 2261(a) is:

> **§ 2261. Interstate domestic violence**
> **(a) Offenses.—**
> **(1) Crossing a State line.**—A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b).
> **(2) Causing the crossing of a State line.**—A person who causes a spouse or intimate partner to cross a State line or to enter or leave Indian country by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner, shall be punished as provided in subsection (b).

18 U.S.C. § 2261(a).

that occurs before interstate travel begins can satisfy the "in the course . . . of that conduct" requirement of § 2261(a)(2) and whether a threat of violence that results in the aggravation of pre-existing injuries can be a "crime of violence" causing "bodily injury" for purposes of the statute. I would answer both questions in the affirmative and conclude that there was sufficient evidence for the jury to convict Page under either theory. Finally, I would reject Page's argument that § 2261(a)(2) is unconstitutional and hold that the statute is a constitutional exercise of Congress's power to regulate interstate commerce.

I. BACKGROUND

The facts of this case are not unlike the stories of many women who attempt to leave abusive relationships. Carla Scrivens's relationship with Page started out on fairly blissful terms. Joint Appendix (J.A.) at 302-03 (Scrivens Test. at 395-96). Yet, Page soon became controlling, possessive, and even physically abusive, demanding that Scrivens stop associating with her friends and family, controlling what she could wear and eat, and on one occasion even punishing her disobedience with a stun gun and mace. J.A. at 303-07 (Scrivens Test. at 396-400). In light of the deterioration of their relationship, after less than three months together, Scrivens told Page that she was moving out and ending their relationship. J.A. at 293-95, 310-311 (Scrivens Test. at 376-78, 408-09).

The planned attack against Scrivens took place when she attempted to retrieve her belongings, all of which were still in Page's condominium in Columbus, Ohio. J.A. at 310-19, 338 (Scrivens Test. at 408-21, 440). Upon Scrivens's arrival, Page pushed her down, dragged her away from the door when she attempted to leave, and tried to spray her with mace. J.A. at 316-17, 322 (Scrivens Test. at 418-19, 424). He then beat her with his fists, a claw hammer, and a pipe wrench over the course of several hours. J.A. at 317-23 (Scrivens Test. at 419-25). Scrivens also testified that Page used a stun gun during the assault. J.A. at 318-21 (Scrivens Test. at 420-23). After the beating, Page carried his victim, who could not walk on her battered feet and legs and who had fallen into unconsciousness several times during the attack, and placed her into his car under threat of further violence from his stun gun. J.A. at 326 (Scrivens Test. at 428). Page then drove around for approximately four hours, crossing state lines through West Virginia into Pennsylvania and intentionally passing several local hospitals on the way even though Scrivens pleaded with him to stop for medical treatment at either Riverside or Ohio State University, two hospitals in the Columbus area. J.A. at 223-24, 324-26, 332 (Scrivens Test. at 167-68, 426-28, 434). During this time, Scrivens continued to bleed, and painful swelling from her injuries increased. J.A. at 215, 335, 338 (Friend Test. at 159, Scrivens Test. at 437, 440). Page eventually left her at a hospital in Washington,

Pennsylvania, where, after she realized that Page would not return, Scrivens told emergency room personnel that Page had attacked her and agreed to report the incident to the police. J.A. at 225-27, 340 (Friend Test. at 169-71, Scrivens Test. at 442).

Page was charged with kidnaping and interstate domestic violence. After his first trial resulted in a hung jury, a second jury acquitted him of kidnaping under 18 U.S.C. § 1201 and convicted him of interstate domestic violence under 18 U.S.C. § 2261(a)(2). The district court rejected Page's argument, in his post-verdict motion for a judgment of acquittal, that there was insufficient evidence to support the verdict because the statute does not (and, constitutionally, may not) reach violence that occurs before travel begins. A divided panel of this court reversed, holding that Page could be convicted under § 2261(a)(2) only for violence committed during the time in which he and Scrivens were actually traveling in the car. *See United States v. Page*, 136 F.3d 481, *vacated*, 143 F.3d 1049 (6th Cir. 1998). Concluding that the jury improperly had been permitted to consider the attack inside the condominium as the "crime of violence" underlying the interstate domestic violence charge, the panel remanded for a new trial. *See id.*, 136 F.3d at 488. We granted rehearing en banc and now affirm by an equally divided vote.

II. STATUTORY SCOPE

Page's conduct, as presented to the jury, falls within the scope of § 2261(a)(2) under at least two theories of liability. The evidence showed that he committed interstate domestic violence both: (1) when, by beating his ex-girlfriend into a state of semi-consciousness over the course of several hours, he was enabled to and did force her across state lines against her will in an attempt to evade the law, and (2) when he forced her to travel interstate under threat of violence, intentionally preventing her from obtaining medical treatment, thereby causing aggravation of her pre-existing injuries.

A. "In the Course of": Infliction of Bodily Injury Integrally Related to the Forcible Transportation of a Victim Across State Lines

In order to escape liability under § 2261(a)(2), Page argues that "in the course . . . of that conduct" as used in the statute refers to the narrow act of "cross[ing] a State line" rather than to all conduct involved in "caus[ing] a spouse or intimate partner to cross a State line . . . by force, coercion, duress, or fraud." As he interprets the statute, it does not reach the violence he committed inside the condominium, even though that conduct was an integral part of his causing his victim to cross state lines by force. This construction not only distorts the plain language of the

statute but also makes little sense given the reality of the crime and the very reasons why Congress believed federal involvement was necessary in this area that has traditionally been left to the states.

The crime of violence that took place inside Page's condominium — the beating and the use of a stun gun and mace — is precisely what enabled Page to force Scrivens to travel across state lines. The beating subdued his victim, rendered her in no condition to resist him physically as she was being placed into his car, and frightened her so severely that she agreed not to make any "commotion" that might attract attention and aid from others once they left his condominium. J.A. at 326 (Scrivens Test. at 428). The attack also allowed Page to retain control over Scrivens during the forcible transportation. Not surprisingly, a person who has just been beaten in the manner Scrivens had been is far less capable physically and emotionally of attempting an escape, formulating a method of escape, or eliciting aid from others. The beating was an integral part of the forcible transportation since it enabled Page to force Scrivens on an unwilling four-hour journey the destination of which was not revealed to Scrivens until much later. J.A. at 332, 337 (Scrivens Test. at 434, 439). Consequently, the beating that took place inside Page's condominium clearly occurred "in the course" of Page forcibly "causing" Scrivens "to cross a State line."

Furthermore, evidence presented to the jury showed that Page removed Scrivens from the local area precisely because he feared the consequences of his having harmed her and knew that interstate travel would make it more difficult for police authorities to hold him liable for his crime. J.A. at 324-25 (Scrivens Test. at 426-27). It is difficult to believe that Congress intended to exclude from this statute's purview the beating of an intimate partner by a batterer who then forcibly transports his victim across state lines under threat of further violence in order to avoid detection from the law. Gaps and inadequacies of state law enforcement were among the main reasons for which federal legislation dealing with domestic violence was thought to be necessary. The VAWA was intended to deal with the problem of batterers who make their crimes more difficult to discover and prosecute by carrying or forcing their intimate partners across state lines. *See* S. REP. NO. 103-138, at 43, 62; *see also Gluzman*, 953 F. Supp. at 87. Those who enacted the VAWA's interstate domestic violence provision recognized that batterers were using interstate travel as a loophole in the system of state law enforcement and that such crimes, "because of their interstate nature, transcend the abilities of State law enforcement agencies." S. REP. NO. 103-138, at 62. When batterers take their victims across state lines, local prosecutors often encounter difficulties subpoenaing hospital documents and witnesses from other states. Multi-state

jurisdiction is also valuable during the investigative stage, in which local police officers encounter similar barriers. *See* Renee M. Landers, *Prosecutorial Limits on Overlapping Federal and State Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 64, 70 (1996) (arguing that federal jurisdiction is appropriate when "offenders seek to exploit the jurisdictional limitations of particular states"); Pamela A. Paziotopoulos, *Violence Against Women Act: Federal Relief for State Prosecutors*, PROSECUTOR, May/June 1996, at 20, 24-25 (recommending ways for state and federal prosecutors to coordinate efforts under VAWA). As it has often done, Congress used the VAWA "to 'com[e] to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent.'" *Moskal v. United States*, 498 U.S. 103, 110 (1990) (quoting *United States v. Sheridan*, 329 U.S. 379, 384 (1946)) (alteration by *Moskal* Court). Page's crabbed interpretation would prevent the statute from reaching precisely the type of situation for which a federal domestic violence statute would be needed and that § 2261(a)(2) was intended to cover.

Reading the statute as Page does, to reach violence that occurs after but not before forced transportation, would be illogical in light of the nature of domestic violence crimes.

As events developed, Page's crime of violence was committed as much "in the course" of forcing Scrivens across state lines as that of a person who beats an intimate partner while standing in the driveway with one foot in a car, or a person who beats an intimate partner while parked at various highway rest stops. The sad truth about domestic violence is that the batterers may well be intelligent people who appear to the rest of society to be upstanding, respectable citizens. At minimum, these batterers are sufficiently intelligent to realize that their chances of being held liable for the abuse of an intimate partner are dramatically higher when they beat their intimate partners outside on the driveway in front of the neighbors or at rest stops populated twenty-four hours a day, rather than inside the home behind closed doors and drawn curtains. Congress very appropriately entitled Subtitle B of the VAWA, which contains the interstate domestic violence provision, "Safe *Homes* for Women." *See* Pub. L. No. 103-322, 108 Stat. at 1798 (emphasis added). One reason why our society has taken so long to accept domestic violence as a crime against society is the fact that it typically does not occur in public places among strangers, but in the privacy of one's own home among intimate partners. *See* Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act after* Lopez, 96 COLUM. L. REV. 1876, 1886 & n.38 (1996). To assume that Congress intended to

criminalize only those beatings occurring precisely during travel but not those occurring inside a home that are integrally related to forcible interstate travel would be to suggest that Congress somehow missed the boat.

The text of § 2261(a)(2) refers to violence that occurs in a course of "conduct." Its neighboring statutes demonstrate that Congress knew how to say in the course of "travel" when it wanted to. In addition to interstate domestic violence, Congress has created the federal crimes of interstate stalking and interstate violation of a protection order. *See* 18 U.S.C. §§ 2261A (interstate stalking), 2262 (interstate violation of protection order). All three of these statutes require interstate travel as an element of the crime, but only § 2261(a)(2) and § 2262(a)(2) involve forcing another person to cross state lines. Sections 2261 and 2262 are parallel, prohibiting interstate domestic violence and interstate violation of a protection order, respectively. Subsection (a)(1) of each section prohibits interstate travel with the intent to commit domestic violence or violate a protection order, respectively. In these provisions — and in § 2261A, which prohibits travel with the intent to harass — coverage is clearly limited to violence or harassment that occurs during or after interstate travel: the statutes refer to actions that occur "subsequent[]" to interstate travel or "in the course of or as a result of such travel." *See* 18 U.S.C. §§ 2261(a)(1), 2261A, 2262(a)(1)(B). In contrast,

subsection (a)(2) of both § 2261 and § 2262 specifically addresses violations that involve forcing another person to travel, and only these two subsections, of all the VAWA crimes, refer to "that conduct." This is a sensible distinction that should not be read out of the statute.[4]

The drafting history of §§ 2261 and 2262 further indicates that the distinction between "that conduct" and "such travel" is not accidental. When first proposed in 1990, both provisions treated travel by the defendant or the

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[4]Similarly, I would not read into the statute the dissenting judges' requirement that the defendant commit a crime of violence for the purpose of causing the victim to travel interstate. Comparison of subsections (a)(1) and (a)(2) of § 2261 reveals that Congress made a distinction between the two offenses in terms of the defendant's state of mind. Each offense has as an element that the defendant "intentionally" commit a crime of violence. The first element of § 2261(a)(1) contains the additional requirement that the defendant travel across state lines "with the intent to injury, harass, or intimidate" an intimate partner. In contrast, the first element of § 2261(a)(2) does not refer to the defendant's state of mind but only to whether he "causes" an intimate partner to cross state lines. Section 2261(a)(2) does not require the government to prove that Page attacked Scrivens for the purpose of taking her to Pennsylvania or even that he knew his actions were causing her to cross state lines at the moment it occurred.

forcing of others to travel in a single subsection. Section 2261 read as follows:

> **§ 2261. Traveling to commit spousal abuse**
>
> (a) IN GENERAL. — Any person who travels or causes another (including the intended victim) to travel across State lines or in interstate commere and who, during the course of any such travel or thereafter, does an act that injures his or her spouse or intimate partner
>
> . . . .

S. REP. NO. 101-545, at 15 (1990) (proposed VAWA of 1990). Thus, the first draft focused exclusively on travel with the intent to harm. This version clearly would have failed to reach violence that occurred before, but was integrally related to, forcible travel.

The next year, several changes were made to this text. Two of these changes are related to each other and directly relevant to this case.[5] First, the offense created by § 2261

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[5]The other major change was that the drafters removed "or in interstate commerce" from the proposed statute, leaving only "travel across state lines." This change made application of the statute more clear-cut and limited it to cases that would actually involve interstate enforcement problems. *See* S. REP. NO. 102-197, at 17 (1991) (proposed VAWA of 1991). It does not affect my

was divided into two offenses, one criminalizing interstate travel for the purpose of committing domestic violence and the other criminalizing forced interstate travel. Second, these two offenses were differentiated by the reference in one to "such travel" and in the other to "that conduct." The new version of the statute was:

§ 2261. Traveling to commit spousal abuse

(a) IN GENERAL. — Any person who travels across State lines —

(1) and who, in the course of or as a result of such travel, commits an act that injures his or her spouse or intimate partner; or

(2) for the purpose of harassing, intimidating, or injuring a spouse or intimate partner and who, in furtherance of that purpose, commits an act that injures his or her spouse or intimate partner . . . .

(b) CAUSING THE CROSSING OF STATE LINES. — Any person who causes a spouse or intimate partner to cross state lines by force, coercion, duress or fraud and, in the course or as a result of that conduct, commits an

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analysis of the charges against Page, since it is undisputed that he took Scrivens across state lines.

act that injures his or her spouse or intimate partner. . . .

S. REP. NO. 102-197, at 17 (1991) (proposed VAWA of 1991). This 1991 language is substantially the same as that which Congress enacted in 1994. A parallel change was made to § 2262. *Compare* S. REP. NO. 101-545, at 16 *with* S. REP. NO. 102-197, at 17-18. It is unlikely that, in separating subsections (a) and (b) of § 2261, the drafters carelessly changed "such travel" to "that conduct" and then repeated the mistake in § 2262. Rather, I believe that they substituted "that conduct" because they intended a meaning different from "such travel."

Two years later, the Senate Report that accompanied the 1993 version of VAWA included one statement that appears to support Page's interpretation of § 2261(a)(2). The report states that the statute "covers cases where the defendant has forced a spouse or intimate partner to cross State lines, and injury or abuse occurs during the course of or as a result of this travel." S. REP. NO. 103-138, at 61. This statement was clearly intended as a restatement of the statutory language, but it used the word "travel" instead of "conduct." This unexplained and apparently inadvertent one-word difference between the statutory text and a statement in the legislative history does not trump the plain meaning of the statute.

Page contends that despite the clear meaning of § 2261(a)(2) the rule of lenity requires that the court impose a narrow interpretation. However, the rule of lenity applies only when "a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating polices' of the statute." *Moskal*, 498 U.S. at 108 (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)) (emphasis in original). A statute is not deemed ambiguous "merely because it [is] possible to articulate a construction more narrow than that urged by the Government" or because reasonable judges disagree in their interpretations of the statute. *Id.* Here, the statutory language is clear, and the government's interpretation is most consistent with the statutory purpose of remedying gaps and inadequacies in state prosecution of crimes between intimate partners.

The district court's instructions to the jury tracked the language of § 2261(a)(2). J.A. at 431 (Jury Instructions at 716). Page has not pointed out any specific flaw in the instructions, and the statutory language permitted conviction if Page forcibly caused Scrivens to cross state lines and the attack inside the condominium was part of "that conduct." Rather than object to the instructions, Page argued to the jury that the language of the instructions did not reach the attack inside the condominium. Trial Tr. at 639-45, 686-88 (Charge Conference, Closing Arguments). The government,

in turn, presented its theory that the attack and the interstate travel were part of a single course of conduct. Trial Tr. at 664-66, 698-700 (Closing Arguments). As I have described, Scrivens was completely incapacitated by the attack, she was under Page's control continuously from just after she entered the condominium until after he left her in the Pennsylvania emergency room, and the attack enabled Page to forcibly remove Scrivens from Ohio against her will. These facts are more than sufficient for a reasonable jury to conclude that the injuries Scrivens suffered during the attack were inflicted in the course of causing her to cross state lines by force, coercion, or duress. It therefore was not error for the district court to allow the jury to consider conviction on that basis. Because there was more than sufficient evidence to support a conviction in this case, this case would not require us to decide the precise outer bounds of the reach of § 2261.

B. "In the Course of": Aggravation of Injuries During Forced Interstate Travel

While there was sufficient evidence to convict Page on the basis of the attack inside the condominium, the government also presented to the jury its theory that using threats of further violence to force an already severely injured intimate partner across state lines, thereby causing the aggravation of her injuries, is a "crime of violence" causing "bodily injury" to that person in violation of

§ 2261(a)(2). Trial Tr. at 699-700 (Closing Arguments). The government argues that Page's threats during the trip to Pennsylvania resulted in "bodily injury" to the extent that they kept Scrivens from receiving medical treatment sooner and aggravated her preexisting wounds. I agree that threats can be a "crime of violence," that aggravation of pre-existing injuries can be "bodily injury," and that there was sufficient evidence to convict Page under this theory.

A "crime of violence" includes "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). It may also be an offense "that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). To meet this definition, the government was required to prove that Page committed some state or federal "offense" and that this offense was of a type described in § 16(a) or (b). The two offenses that the jury considered were kidnaping and assault. J.A. at 434 (Jury Instructions at 719). The evidence presented was that Page threatened to use a stun gun against Scrivens in order to obtain her cooperation in being transported across state lines. Page kept the stun gun in his pocket and made certain Scrivens knew he had easy access to it during the ride. J.A. at 326 (Scrivens Test. at 428). Moreover, while

they traveled interstate, Page threatened to push Scrivens out of the car and to leave her on the side of the road where no one would ever find her. J.A. at 334 (Scrivens Test. at 436).

At the en banc oral argument, Page claimed that this conduct could not be the underlying "crime of violence" for the interstate domestic violence charge because threats are not "assault" under Ohio law. Ohio defines "assault" as causing or attempting to cause physical harm to another. *See* OHIO REV. CODE ANN. § 2903.13 (Banks-Baldwin West 1994 & Supp. 1998); *cf.* OHIO REV. CODE ANN. § 2903.22 (defining menace). The jury was given the Ohio definition of assault and was instructed that "crime of violence" means:

> an offense that has as an element the use, attempted use or threatened use of physical force against the person or property of another or conduct which by its nature presents a serious potential risk of physical injury to another. Crime of violence includes kidnaping and assault.

J.A. at 434 (Jury Instructions at 719). Part of this instruction misstates 18 U.S.C. § 16(b) by failing to specify that only felonies are classified as crimes of violence on the basis of their inherent risk and by requiring that there be a risk of "physical injury" rather than merely a risk "that

physical force . . . may be used." However, this error was harmless. Kidnaping and assault were the only possible crimes of violence offered to the jury. J.A. at 434 (Jury Instructions at 719); Trial Tr. at 665, 686 (Closing Arguments). Kidnaping is a felony and satisfies § 16(b); assault satisfies § 16(a).[6]

Page's argument on appeal that his conduct after leaving the condominium was not "assault" overlooks the fact that this conduct caused physical harm to Scrivens. If his threats had merely caused Scrivens to fear him, his crime would have been considered "menacing" rather than "assault" under Ohio law.[7] However, on the particular

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[6]Although it is possible to read the district court's instructions as permitting the jury to find a "crime of violence" without limiting itself to either kidnaping or assault, the parties' closing arguments, in conjunction with the instructions, made clear that those two crimes were the only choices. Moreover, Page did not object to the district court's definition of "crime of violence" except to argue that on these facts kidnaping could not be a crime of violence. Trial Tr. at 639-45 (Charge Conference), 727 (Jury Instructions).

[7]"Menacing" is "knowingly caus[ing] another to believe that the offender will cause physical harm to the person." OHIO REV. CODE § 2903.22. Menacing satisfies the definition of "crime of violence" in 18 U.S.C. § 16(a) and is also considered an offense of violence under Ohio

facts of this case the threats accomplished an assault because they prevented Scrivens from obtaining medical attention and thereby caused her to suffer further injury. I am therefore satisfied that the jury could have found that Page caused physical harm to Scrivens within the meaning of the Ohio statute. *Cf. State v. Brooks*, 542 N.E.2d 636, 642-43 (Ohio 1989) (holding that brandishing a weapon can constitute attempted assault if coupled with other conduct "strongly corroborative" of intent to cause physical harm); *State v. Green*, 569 N.E.2d 1038, 1041 (Ohio 1991) (explaining that the corroborative conduct can include "verbal threats as perceived by a reasonable person under the circumstances"). In fact, this theory of conviction depended on the jury finding that Page's threats caused physical harm to Scrivens, because the government had to prove, as a separate element of the domestic violence conviction, that the threats caused Scrivens to suffer "bodily injury."

Alternatively, the jury could have found kidnaping to be the underlying crime of violence. Although the jury acquitted Page of the kidnaping charge, that acquittal does not require us to assume that the jury did not rely upon

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law. *See* OHIO REV. CODE § 2901.01(A)(9)(a). However, because the jury was not instructed on the elements of menacing, I do not consider it as a predicate crime on which the jury could have based its conviction.

kidnaping as the underlying crime of violence for the § 2261(a)(2) conviction. *See United States v. Powell*, 469 U.S. 57, 67-69 (1984) (holding that acquittal of a predicate crime does not undermine conviction for a compound crime and stating that "there is no reason to vacate [the] conviction merely because the verdicts cannot rationally be reconciled"); *see also United States v. Gaitan-Acevedo*, 148 F.3d 577, 586 (6th Cir. 1998) (affirming conviction for conspiracy despite acquittal on substantive charge), *cert. denied*, --- U.S. ---, 1998 WL 480139 (Oct. 5, 1998).[8]

In addition to proving that Page committed a kidnaping or an assault during the actual travel, in order to obtain a conviction under its aggravation-of-injury theory, the government had to prove that the kidnaping or assault caused Scrivens to suffer bodily injury. The statute defines "bodily injury" as "any act, except one done in self-defense, that results in physical injury or sexual abuse." 18 U.S.C. § 2266. The district court went beyond this definition, requiring the government to prove that Scrivens suffered a "significant injury; for instance, an injury that is painful and obvious or is of a type for which medical attention ordinarily would be sought." J.A. at 434 (Jury Instructions

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[8]This rule also disposes of Page's claim that he cannot be convicted of interstate domestic violence because the kidnaping acquittal necessarily means that Scrivens consented to being taken across state lines.

at 719). The government presented testimony that Scrivens was "dripping blood onto the emergency room floor" when she arrived at the hospital several hours after the beating and that she lost a significant amount of blood, which caused her to lose consciousness at times during the extended trip. J.A. at 215, 217, 335 (Friend Test. at 159, 161, Scrivens Test. at 437). There was also testimony that Scrivens's wounds were so swollen from the delay in getting to the hospital that emergency room personnel had to call an IV specialist team to get an IV into her. J.A. at 231 (Friend Test. at 175). She experienced great pain throughout the trip. J.A. at 335 (Scrivens Test. at 437). The additional pain caused by the delay and the potentially dangerous loss of blood were certainly "bodily injury."

Nowhere does the statute suggest that the bodily injury must be an injury newly inflicted, completely distinct from the prior criminal actions of the batterer. Such a limitation would make little sense. If we were to require that an injury be "fresh" in order to satisfy the statute, Page's actions would not constitute a crime of interstate domestic violence even if Scrivens had bled to death or gone into shock during and as a result of[9] the forcible transportation.

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[9]The additional injuries Scrivens suffered due to Page's preventing her from obtaining medical care were both "in the course" of the forced interstate travel and the "result" of that forced travel. An event (X) that results from

Page's interpretation would also prevent the statute from reaching the conduct at issue in *United States v. Bailey*, 112 F.3d 758 (4th Cir.), *cert. denied*, --- U.S. ---, 118 S. Ct. 240 (1997). The defendant in *Bailey* severely injured his wife, put her in a car, and drove around West Virginia and Kentucky for five days before taking her to a hospital. The victim suffered further injuries — including blood loss, which led to permanent brain damage, and dehydration, which led to renal failure — due to the defendant's failure to obtain medical care or provide adequate food and water.[10] There was no question in *Bailey* that the statute applied. Yet, there is no relevant distinction between a person who forcibly prevents his intimate partner from obtaining medical care, causing her to bleed to death; a person who forcibly prevents his diabetic intimate partner

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another (Y) does not necessarily need to follow it. The beginning of event X can precede the end of event Y, especially when event Y spans a lengthy period of time, as interstate travel might. In other words, a crime of violence does not have to take place after the travel completely ends in order for one to say that the crime of violence was the result of the travel.

[10]The victim in *Bailey* also had bruises on her wrists and ankles, where she had been bound, and these injuries may have been "new," i.e., inflicted after the travel began. *See Bailey*, 112 F.3d at 762. I do not think, however, that the conviction rested on those injuries alone.

from obtaining insulin shots, causing her to fall into a coma; and a person who forcibly prevents his intimate partner from obtaining food and water for several days, causing her to suffer renal failure. Any prior criminal actions of these batterers should in no way weaken or negate the observation that these three situations are analogous and that in all of these scenarios the batterer has committed a crime of violence causing bodily harm.

I note as well that the seriousness of the bodily injury is not a proper basis for negating criminal liability under § 2261(a)(2). Whether or not one is guilty of interstate domestic violence does not depend on the seriousness of the bodily harm suffered by the victim. The fact that the victim in *Bailey* suffered permanent damage does not render Page any less culpable under § 2261(a)(2). The statute clearly states that the degree of harm inflicted on the victim is instead to be taken into account at the sentencing stage pursuant to 18 U.S.C. § 2261(b).[11] By any definition, the painful swelling and loss of blood that Scrivens suffered as a result of being unable to seek prompt medical attention constituted "bodily injury."

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[11]Section 2261(b) specifically distinguishes between those situations in which the victim dies, those in which the victim suffers "permanent disfigurement or life threatening bodily injury," those in which the victim sustains "serious bodily injury," and "any other case."

III. CONSTITUTIONALITY

In *United States v. Lopez*, 514 U.S. 549, 558 (1995), the Supreme Court described three categories of Commerce Clause legislation that Congress may enact. First, Congress may regulate the channels of interstate commerce. Second, it may regulate and protect the instrumentalities of interstate commerce. Third, Congress may regulate intrastate activity if it has a substantial effect on commerce. *See id.* at 558-59. Because the triggering factor of § 2261(a)(2) is the movement of the victim across state lines, this statute falls into the first category and is a valid exercise of Congress's power to regulate the "use of the channels of interstate commerce."[12] *Id.* at 558.

The Supreme Court recently reiterated the well-settled principle that "the transportation of persons across state lines" is a "form of 'commerce.'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, ---, 117 S. Ct. 1590, 1596 (1997) (citing *Edwards v.*

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[12]My analysis under the first *Lopez* category should in no way be interpreted as foreclosing either the second or third *Lopez* category as a valid basis for upholding the constitutionality of 18 U.S.C. § 2261(a)(2) under the Commerce Clause. I have chosen to limit my discussion to this first category simply because it was the focus of the government's arguments on appeal.

California, 314 U.S. 160, 172 (1941), and *Caminetti v. United States*, 242 U.S. 470, 491 (1917)). In *Caminetti*, the Court upheld the White Slave Traffic Act of 1910, under which the defendant had been convicted of transporting a woman across state lines for the purpose of prostitution or debauchery. The Court rejected the argument that the statute exceeded Congress's powers under the Commerce Clause because the purpose of debauchery was unrelated to commerce. *See Caminetti*, 242 U.S. at 484-85, 488 n.1, 491; *see also Cleveland v. United States*, 329 U.S. 14, 16-19 (1946) (upholding application of the Mann Act to interstate travel for the purpose of polygamous marriage). Section 2261(a)(2) is similarly constitutional under the Commerce Clause because the interstate domestic violence provision's requirement of "the crossing of a state line . . . plac[es] the [commission of a crime of violence causing bodily injury] squarely in interstate commerce." *Bailey*, 112 F.3d at 766 (analogizing the commission of a crime of violence causing bodily injury to "the debauchery forbade in *Caminetti*"). Any arguably intrastate nature or timing of the crime of violence is irrelevant, just as it was with respect to the debauchery in *Caminetti*.

Page contends that Congress nonetheless exceeded its constitutional authority because, after *Lopez*, a criminal statute that regulates non-economic activity must be analyzed under the third category. This argument is based

on a mis-reading of *Lopez*. *Lopez* has caused some controversy over whether purely *intrastate*, non-commercial activities can ever have the substantial effect on interstate commerce that is necessary to bring them within Congress's power. *Lopez* did not, however, extend the "substantial effects" test to all Commerce Clause legislation. Congress retains plenary power to regulate the channels of interstate commerce. *See United States v. Robertson*, 514 U.S. 669, 670 (1995) (explaining that the "substantial effects" test defines the extent of Congress's power to regulate intrastate activity and does not apply when the regulated activity itself crosses state lines); *Gluzman*, 953 F. Supp. at 89-90 (rejecting the same argument that Page makes and upholding § 2261(a)(1)), *aff'd*, 154 F.3d at 50 (adopting "the holding and analysis set forth in the admirable opinion of the district court below"); *see also United States v. Von Foelkel*, 136 F.3d 339, 341 (2d Cir. 1998) (upholding § 2262(a)(1)). To hold that § 2261(a)(2) is unconstitutional, we would have to hold that *Lopez* overruled a long line of cases upholding Congress's power to criminalize acts occurring in interstate commerce. To the contrary, the *Lopez* Court's two examples of Congress's power over the channels of interstate commerce included a criminal prosecution under the Fair Labor Standards Act and a quotation from *Caminetti*. *See Lopez*, 514 U.S. at 558 (citing *United States v. Darby*, 312 U.S. 100, 114 (1941) and *Heart of Atlanta Motel, Inc. v. United States*,

379 U.S. 241, 256 (1964) (quoting *Caminetti*, 242 U.S. at 491)).

Page tries to distinguish this case from *Caminetti* and other cases allowing congressional regulation of interstate transportation by arguing that the *actus reus* of his crime was the initial attack on Scrivens, which was purely intrastate, while under statutes such as the White Slave Act and the Mann Act the *actus reus* is the actual movement across state lines with immoral intentions. His complaint is that although purporting to criminalize an act of *inter*state travel, Congress has "really" criminalized *intra*state domestic violence. Such an analysis was the basis for the holding that Congress could not bar the interstate shipment of the products of child labor because it was "really" trying to prohibit child labor itself. *See Hammer v. Dagenhart*, 247 U.S. 251, 271-72 (1918), *overruled by Darby*, 312 U.S. at 116-17. This approach to the interstate commerce power has long since been rejected. Congress undoubtedly has the power to criminalize the forcible transportation of a person across state lines. It may as easily focus its efforts on the smaller class of cases in which the forced transportation is part of an incident of domestic violence in which the victim suffers bodily injury.

IV. MISCELLANEOUS ISSUES

The panel's decision in this case addressed and rejected several challenges to the district court's evidentiary rulings. *See Page*, 136 F.3d at 487-88. Page has not pressed these objections before the en banc court, and I adhere to the panel's analysis of those issues.

Page also argued to the panel that the district court erred when it determined his base offense level by reference to the Sentencing Guidelines' provision for "aggravated assault," rather than "minor assault." Aggravated assault has a base offense level of fifteen, while minor assault has a base level of six or three. *See* U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) §§ 2A2.2, 2A2.3 (1997). Because the panel reversed Page's conviction, it did not reach this issue.[13]

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[13]The panel noted that, since the time of Page's trial, the Sentencing Guidelines have been amended to specify that the base offense level for domestic violence is fourteen. *See* U.S.S.G. § 2A6.2(a). Two levels are added if one of several factors is present, including infliction of bodily injury or possession or threatened use of a dangerous weapon; four levels are added if more than one of these factors are present. *See* U.S.S.G. § 2A6.2(b). If the relevant conduct is also covered by other Guidelines, courts are to choose the higher of the two base offense levels. *See* U.S.S.G. § 2A6.2(c). Because I would affirm the manner in which the district court applied the

Page's challenge to his sentence rests primarily on his argument that the attack inside the condominium is not within the scope of his federal prosecution. As I believe that the incidents in the condominium were part of a violation of § 2261(a)(2), I also believe that it clearly was proper for the district court to consider them at sentencing. Even if the jury based its verdict entirely on the "aggravation" theory, it is proper for a sentencing court to consider all of a defendant's conduct "that occurred during the commission of the offense of conviction [or] in preparation for that offense." U.S.S.G. § 1B1.3(a)(1). This includes conduct that is not charged or for which the defendant is acquitted. *See United States v. Watts*, 519 U.S. 148 (1997); *United States v. Milton*, 27 F.3d 203, 208-09 (6th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995). The district court therefore did not err in basing Page's sentence on the base offense level for aggravated assault.

V. CONCLUSION

Because 18 U.S.C. § 2261(a)(2) is a valid exercise of Congress's powers under the Commerce Clause and reaches those situations where a beating of an intimate partner is integrally related to the subsequent transportation of the

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Guidelines in existence at the time of Page's sentencing, I would not impose these harsher provisions.

victim across state lines by force, I concur in the order affirming Page's conviction and sentence.

DISSENT

KENNEDY, Circuit Judge, dissenting in the order. I agree with that part of Judge Moore's opinion that concludes Congress validly enacted the Violence Against Women Act under its commerce power. I cannot agree, however, that the Act criminalizes Page's pre-travel violence in this case and his conviction should be reversed.

Preceded by a descriptive caption, one sentence containing four separate elements defines the federal domestic violence crime in question:

> **Causing the crossing of a State line**. - A person who [1] *causes* a spouse or intimate partner *to cross a State line* or to enter or leave Indian country by force, coercion, duress, or fraud [2] *and, in the course or as a result of that conduct*, [3] intentionally commits a crime of violence [4] *and thereby causes bodily injury* to the person's spouse or intimate partner, shall be punished as provided in subsection (b).

18 U.S.C. § 2261(a)(2) (Emphasis and numbering added).

A literal or precise reading of the words of the sentence, and the sequence of elements described there, requires me to find that Page should not be punished under this statute for the criminal assault that occurred before he began to cause Scrivens to cross a state line. That result is necessary because an offender is covered by the statute only if he "causes" the victim "to cross a state line" by force, coercion, duress, or fraud, and "causes bodily injury" to the victim "in the course . . . of that conduct;" that conduct of causing the victim "to cross a state line" by force, coercion, duress, or fraud. The literal meaning of the words does not allow punishment of a man who beats a woman before the journey begins *unless of course his purpose in inflicting bodily injury is to cause her to cross states lines.* The provision therefore criminalizes an act of domestic violence that occurs before interstate travel actually begins only if the violence is the same "force" that the attacker employs to cause his victim to cross state lines against her will *and* the attacker's purpose at the time he inflicts the injury is to transport his victim across state lines.

The construction I have described above appears to be the obvious meaning of the statute. In criminal law, we should not strain to give a broad construction to a penal statute. For centuries in Anglo-American law, the rule of lenity has required a strict construction of criminal statutes. *United States v. Lanier*, 117 S. Ct. 1219, 1225 (1997) ("[T]he

canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered"). *United States v. Wiltberger*, 18 U.S. 76, 93-96 (1820) (opinion by Chief Justice Marshall). As Judge Merritt explained in the original panel's opinion in this case, "[w]e must enforce the statute according to the words that Congress actually adopted and not according to our own view of what might be a better or more comprehensive statutory policy on domestic violence against women." *United States v. Page*, 136 F.3d 481, 484 (6th Cir. 1998).

Judge Moore concludes that because Scrivens was completely incapacitated by the attack, she was under Page's control continuously from the time she entered the condominium until she crossed state lines, and that this somehow permitted the jury to find that the injuries she suffered in the attack in the condominium were inflicted in the course of causing her to cross state lines.[14] While I agree that injuries inflicted before any travel begins can be found to be a part of "that conduct" if inflicted to cause the victim to cross state lines, there is no evidence here that such intent caused any of the injuries Scrivens sustained before she was placed in the car.

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[14]Judge Moore appears to be including in "that conduct" any continuous control that is followed by the crossing of a state line without regard to the defendant's intent.

Were the evidence in this case such that the jury could conclude that the *severity* of the attack was to enable Page to take Scrivens across state lines to a distant hospital, then I could agree that conduct was covered by the statute. But the record does not support a finding that the attack in the condominium had such a purpose. As Judge Moore acknowledges: "Furthermore, evidence presented to the jury showed that Page removed Scrivens from the local area precisely because he feared the consequences of his having harmed her and knew that interstate travel would make it more difficult for police authorities to hold him liable for his crime."

If there were some evidence that any of the *particular injuries* inflicted on Scrivens were inflicted not merely to prevent her escape from the condominium, but specifically in order to make it easier to transport her across state lines, a juror could find that defendant's effort to cause her to cross state lines had begun. I could then agree that Page's attack is covered by the statute. While causing someone to cross state lines encompasses broader conduct than simply traveling across state lines, still there must be some evidence from which the jury could find the connection between the earlier violence and "causing" the victim to travel. More important, even were we to accept Judge Moore's reading of the statute, the jury was never instructed that the injuries had to be inflicted as a part of causing her

travel. The government's closing argument that it was all the "same course of conduct" is not a substitute for a proper instruction.

In sum, the plain language of section 2261(a)(2) shows that Congress did not intend the statute to apply to those attacks where, after the fact, the defendant decides to use interstate travel to conceal his wrongdoing. By no means do I suggest that Congress should not have criminalized such conduct. Indeed, the particularly disturbing facts of cases such as *Page* and *United States v. Bailey* suggest that it would not have been illogical to criminalize flight across state lines to avoid apprehension.[15] As enacted by

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[15]Only two other prosecutions arising under § 2261(a)(2) have reached the courts of appeal to date: *United States v. Bailey*, 112 F.3d 758 (4th Cir.), *cert. denied*, 118 S. Ct. 240 (1997), and *United States v. Hornsby*, 88 F.3d 336 (5th Cir. 1996). In both *Bailey* and *Hornsby*, as in this case, the defendant brutally beat his victim first (without any obvious present intent to transport her across state lines) and then after she was subdued, put her in a car and transported her across state lines. Neither defendant specifically challenged the application of § 2261(a)(2) to pre-travel violence.

The defendant's evasive behavior in *Bailey* was particularly egregious. The defendant attacked his wife in their bedroom, inflicting head injuries and causing her to lose a significant amount of blood. After letting her lie

Congress, however, the Act requires the attacker to intend to cause interstate travel. The provision at issue applies to situations where "force, coercion, duress or fraud" on the part of the defendant triggers the interstate travel, and then sometime in the course or as a result of *causing* the victim to travel, the defendant commits a crime of violence and inflicts bodily injury on the victim. Sadly, Congress simply did not draft the statute to cover the situation in which an attacker first beats an intimate partner, and only later develops the intent to transport her across state lines in order to hamstring law enforcement efforts or conceal evidence. If Congress intends to criminalize such conduct, Congress should state so clearly. Accordingly, I would reverse the judgment and the conviction.

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there for "an extended period," he locked her in the trunk of the car and drove her back and forth between West Virginia and Kentucky over the next six days. He decided "not to take her to a hospital, but rather to 'avoid publicity and to treat her himself.'" *Bailey,* 112 F.3d at 762. Her condition became "desperate" and Bailey realized he needed to take her to the hospital. By the time she arrived, many of Mrs. Bailey's injuries were permanent. The doctor testified that she will likely never walk again, but with years of rehabilitation she might learn to feed herself and to talk. *Id.* at 763-64.

I agree with Judge Moore that the evidence would permit the jury to find that the further injuries Scrivens suffered while the defendant was causing her to cross state lines would sustain a guilty verdict. However, the case was neither argued to the jury nor submitted on instructions on that theory.[16] I would, therefore remand the case for a new trial on that theory.

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[16]The following are the totality of the court's instruction on the elements of the domestic violence charge.

> One, that Carla Elena Scrivens was the spouse or intimate partner of the defendant Derek Duane Page;
>
> Two, the defendant Derek Duane Page caused Carla Elena Scrivens to cross a state line by force, coercion, duress or fraud;
>
> Three, that in the course of or as a result of that conduct the defendant Derek Duane Page intentionally committed a crime of violence;
>
> And, fourth, thereby caused Carla Elena Scrivens to suffer bodily injury.

* * *

Similarly, count two of the indictment reads in the disjunctive in that it charges that the defendant Derek Duane Page did cause his intimate partner Carla Elena Scrivens to cross a state line from Ohio to West Virginia and from West Virginia to Pennsylvania and elsewhere by force, coercion, duress or fraud.

It is not necessary to prove beyond a reasonable doubt that defendant Derek Duane Page used all of these methods to cause Carla Elena Scrivens to cross a state line. Rather, you need only find beyond a reasonable doubt that defendant Derek Duane Page intentionally used one of these methods; for example, by force, coercion, duress or fraud.

At no place in the instructions did the court explain the meaning of "that conduct."
The government argued only as follows:

The language "in the course of this conduct" or "in relation to the conduct" doesn't matter if the beating occurred first or the beating occurred last or if he pushed her out on the way. The fact is it was in the same course of conduct. It happened the same night by the same person with the same victim, and that's the meaning of the statute.

DISSENT

RYAN, Circuit Judge, dissenting. The charge against the defendant, as laid in the indictment, required the government to prove that the defendant violated 18 U.S.C. § 2261(a)(2) by inflicting physical violence upon Scrivens "in the course or as a result of" causing her, by force, coercion, or duress, to cross the state line. The evidence does not show that; rather, it shows that the defendant inflicted physical violence upon Scrivens at her condominium, before he forced her to cross the state line.

Judge Moore's opinion attempts to give section 2261(a)(2) a meaning its language cannot accommodate, apparently on the theory that Congress surely must have intended to punish what the defendant did. But the square-pegged evidence in the record cannot properly be hammered into the oblong-shaped statute—not if faithfulness to the

words of the statute matters—because it does not fit. Equally unavailing is Judge Moore's apparent willingness to affirm the defendant's conviction on the basis of the post-interstate-travel injuries Scrivens suffered, because that theory of culpability was not argued to the jury or submitted to it by the trial court in its instructions.

Domestic violence against women is deplorable—often cowardly—but it ill suits this court to rewrite more broadly what Congress has written narrowly on the theory that had it anticipated what the defendant did here, Congress surely would have wanted it punished.

I do agree with Judge Moore on one point: the Violence Against Women Act is plainly constitutional.

DISSENT

HARRY W. WELLFORD, Circuit Judge, dissenting. This is a difficult case of first impression for our court. Essentially, Judge Moore applies the Violence Against Women Act to cover the situation where defendant assaulted and impaired seriously a female partner before any interstate transportation occurred. I cannot agree that vague threats, unaccompanied by any physical violence during the course of the interstate travel, is sufficient for conviction under the charge if the threats and travel "kept Scrivens from receiving medical aid sooner." Defendant did, after he committed his reprehensible attack in Ohio, transport Scrivens across a state line and finally delivered her to a hospital for treatment. He displayed no weapon and laid no hand upon her during the trip. Furthermore, I do not agree that aggravation by failure to treat can constitute "bodily injury" within the meaning of the statute.

Nor can I agree that one acquitted of kidnapping may yet be deemed guilty of that offense under Ohio law dealing with the meaning of assault, or under § 2261(a)(2). Whatever else the meaning and effect of Page's kidnapping acquittal, it does not permit the court to treat kidnapping as

being an "underlying crime of violence for the § 2261(a)(2) conviction." I do not believe *United States v. Powell*, 469 U.S. 57, 67-69 (1984), which stands for the proposition that we do not vacate convictions merely because verdicts cannot be reasonably reconciled, supports the Judge Moore's rationale in this case.

To the contrary, I believe that the language in S. Rep. No. 103-138 at 61 that the statute in question "covers cases where the defendant has forced a spouse or intimate partner to cross State lines, and injury or abuse occurs during the course of or as a result of this travel" is the proper interpretation of this ambiguous statute. Section 2261(2) refers to "causing the crossing of a state line," or travelling in interstate commerce; it is not clear to me that the "in the course of or as a result of such conduct" language refers to such travel or to violent conduct or force causing such travel, or whether force, coercion and assault that occurred *before* the interstate travel is covered at all.

This case was neither argued by the government nor submitted to the jury on instructions that the jury might determine that further bodily injuries, if any, suffered by Scrivens while in the course of interstate travel after the initial Ohio assault, were sufficient to support guilt.

There was no proof in this case that any physical assault or force was applied to Scrivens' body after she and

Page left the Ohio apartment together. The record reveals the following testimony of Scrivens:

> Am I correct that, from the minute you left the apartment until the time that Derek left you at the hospital in Washington, Pennsylvania, that he did not strike you, hit, you, do anything of that nature?
>
> A. Right.
>
> Q. So the injuries that you presented with at the hospital in Washington, Pennsylvania were injuries that you suffered inside that apartment; isn't that true?
>
> A. That's true.
>
> Q. Once you got to the hospital, am I correct that you're in a wheelchair, and somebody some man, white man, showed you down to the emergency room from where you were, where you first came in the hospital?
>
> A. Derek pushed me. He was directing us to the emergency room, and he was pushing me in the wheelchair.

In short, I cannot agree that the initial beating in Ohio may constitute interstate domestic violence, because such violent conduct enabled Page to force Scrivens, at a much later time, to cross state lines without using any further physical force to inflict further bodily injury. I do not believe that by enacting the language in question, Congress intended to criminalize some indirect connection between interstate travel and violent acts occurring before such travel bringing about domestic bodily injury. This is not construing the statute to require an act of violence "occurring at the moment a state line is crossed." Judge Moore cites S. Rep. No. 103-138 at 61 (1993) as indicating an intent to provide a federal remedy for "interstate crimes of abuse including crimes committed against spouses or intimate partners *during interstate travel*." My point in this case is that the violent acts and beating of the intimate partner did not occur "during interstate travel." The jury instructions did not make it clear exactly what had to be proven, particularly where the jury did not conclude that kidnapping had occurred, involving a forceful taking across state lines.[17]

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[17]*United States v. Bailey*, 112 F.2d 758 (4th Cir. 1997), distinguished VAWA and kidnapping because the former required "a spouse or intimate partner" as victim. *Id.* at 767. Surely kidnapping in this case cannot be the "underlying crime of violence" in view of the jury's acquittal on that charge, yet the majority says "the jury

In addition, I share some skepticism about this statute which purportedly is based upon concern about gender violence. What if the victim in this case were Page's former wife with whom he had no relationship at the time of the offense? What if it had been another female relative, neither his wife nor intimate partner? Prosecution of such an offense against any female by Page would have been handled by the states as it has been handled in cases of assault and battery, long before this statute came into being. *See Brzonkala v. Virginia Poly. Inst.*, 132 F.3d 949, 967 (4th Cir. 1997) (concluding that the statute passes constitutional muster because "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce").

I also note that the language used is not that crimes of violence, motivated by domestic abuse and discord, have a substantial effect on interstate commerce. I would call attention, in this regard, to the *Brzonkala* dissent's statement:

> Ignoring entirely the overarching change in Commerce Clause analysis wrought by *Lopez* [514 U.S. 549 (1995)], the majority merely

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could have found kidnapping to be the underlying crime of violence." Can the jury both acquit and convict based on the same charge? I think not.

recites several statements from House and Senate committees on the general problem of violence against women and the effect of that violence on the national economy. . . .

. . .

The majority's wholesale deference to a committee finding would at least be understandable if that committee had made extensive findings deserving of deference. However, the majority ultimately sustains the constitutionality of the Act literally on the basis of a single sentence appearing in that committee report, which sentence is, itself, entirely conclusory.

. . .

In short, the majority opinion reads, as intended, as if *Lopez* were never decided, holding for our Circuit, explicitly on the authority of Judge Kravitch's opinion in *United States v. Wright*, 117 F.3d 1265, 1269 (11th Cir. 1997), and implicitly on the reasoning advocated by the dissenting Justices in *Lopez*, that "'*Lopez* did not alter our approach to determining whether a particular

> statute falls within the scope of Congress's Commerce Clause authority.'"

132 F.3d at 974, 975, 977 (Luttig, C.J., dissenting).

Accordingly, I would **REVERSE** the conviction in this case, realizing that Page may still be prosecuted, and/or sued civilly, for his actions in Ohio state court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING AND
REHEARING *EN BANC*

Sixth Circuit Case Nº. 96-4083
Filed March 30, 1998

Pages B-1 thru B-47

CASE Nº. 96-4083

In The

United States Court of Appeals

For The Sixth Circuit

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEREK DUANE PAGE,

Defendant - Appellant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT COLUMBUS

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

6th Circuit
Court of Appeals
Filed 3/30/98

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REQUIRED STATEMENT FOR REHEARING *EN BANC*

Pursuant to Rule 14(a) of the Local Rules of this Court, the undersigned states as follows:

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves questions of exceptional importance:

> Whether subsection (a) (2) of the "interstate domestic violence' statute, 18 U.S.C. § 2261, applies to the infliction of bodily injury which occurs immediately before interstate transportation of an intimate partner where the violent act enables and supplies a reason for that transportation or whether it only covers situations where the bodily injury is inflicted during or after the interstate transportation?

The undersigned further certifies that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

/s/ Sharon J. Zealey
SHARON J. ZEALEY
UNITED STATES ATTORNEY

No. 96—4083

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

DEREK DUANE PAGE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The United States of America, appellee herein, by and through its counsel and, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully petitions for a rehearing of the February 12, 1996, decision of this Court in the within case, and pursuant to Rule 35 of the Federal Rules of Appellate Procedure, also suggests the appropriateness of rehearing en banc of that decision.

This case involves an exceptionally important question concerning whether subsection (a)(2) of the "interstate domestic violence statute, 18 U.S.C. § 2261, covers the infliction of bodily injury which occurs immediately before interstate transportation of an intimate partner where the violent act enables and supplies a reason for that transportation or whether it only covers situations where the bodily injury is inflicted during or after the interstate transportation.

The fact situation in this case represents the most common occurrence of domestic violence involving interstate travel as shown by cases presented to the Department of Justice and prosecuted under this statute. **See**, Addendum A, Summary of Cases. Thus, this decision has removed a major tool in law enforcement's multi-pronged attack on intra—family violence, recognized, inter alia, as the single largest threat of injury to adult women in the United States, ahead of heart attacks, strokes and cancer.[1]

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[1] S. Rep. 103—138, 1993 WL 355617 (Leg.Hist.) in "Discussions at 140 relying on findings of the U.S. Surgeons General over the last several years and citing to Biden, "Domestic Violence, A Crime, Not a Quarrel", Trial at 56 (June, 1993).

The importance of the statute as applied to the facts of this case is demonstrated, in part, by the fact that Attorney General Janet Reno testified personally before the Senate Judiciary Committee on May 15, 1996, concerning the effect of passage of the Violence Against Women[2] Act ("VAWA") in this country. 1996 WL 256684 (F.D.C.H.). While this statute is but one small part of the VAWA, the Attorney General noted not only the statutory section, but also described the exact factual situation in this case as an example of the statute's protection. Id. at p. 3.

While the majority opinion assumed without discussion that the statute was ambiguous, it is not. Even if it is found to be ambiguous, the plain meaning is easily determined using standard canons of statutory construction. In either event, the statute criminalizes Defendant Page's actions.

It is also significant that neither party to the appeal argued the legislative history of the statute in its brief, nor addressed the issue at oral argument; however, the majority opinion relies almost exclusively on legislative history in arriving at its admittedly narrow interpretation. The legislative history relied upon by this Court is incomplete;

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[2] It is important to note that while the statute is gender neutral in application, the title still reflects the problem which engendered it: violence against women.

whereas, the full legislative history supports the government's prosecution. Whether the bodily injury occurs before and facilitates the interstate transportation or whether it occurs during or after the transportation, the difficulties of state prosecution and concomitant need for Federal prosecution are the same.[3]

In this case of first impression under this statute, the panel arrived at three different conclusions as evidenced by the majority, concurring and dissenting opinions.[4] The important question of how this statute criminalizes domestic violence when there is an interstate component should not be decided for this Circuit in a fragmented decision.

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[3] The testimony indicates that the VAWA sought, inter alia, to address the subtle prejudice that many women victims encountered once they actually tried to report domestic violence and to seek help from the legal system. It would indeed be ironic if one of the supposed solutions to the problem made it more difficult to prove interstate domestic violence (where in the Sixth Circuit, the victim now must be careful not to receive an injury before she is forced into a car for interstate travel or must provoke an additional attack during or after the travel) than to prove a car jacking (where the car merely needs to have traveled in interstate commerce at some point in its life).

[4] Judge Moore actually dissented in part, but concurred in part indicating agreement with the majority who found the statute constitutional.

STATEMENT

On the evening of July 24, 1995, Defendant Page tricked his ex—girlfriend, Carla Scrivens, into returning to his condominium. Then proceeded to brutally beat her in a planned attack with the claw end of a hammer, a large pipe wrench and his fists after he had subdued her with pepper spray and a stun gun. The 3 hour attack left the victim unable to walk or use her hands, bleeding from numerous wounds, and in and out of consciousness. Immediately after the beating, Page carried the victim to his car at midnight and abandoned her at an emergency room in Pennsylvania 4 hours later. She had been warned not to cry out for help as he patted his pocket where he had placed the stun gun. He threatened along the way to push her out of the car where no one would ever find her. He told her he wanted her out of Ohio away from friends and the Police and told her never to come back.

The case was originally investigated by the Pennsylvania State Police who dropped their investigation when they learned that the beating had occurred in Ohio. Local Ohio law enforcement sought help from federal investigators and a federal prosecution ensued. Page was charged with kidnaping and with interstate domestic violence in the Southern District of Ohio where he was tried and acquitted of the first charge, but convicted of the

second charge, a violation 18 U.S.C. S 2261(a) (2).[5]

The district court denied Page's motion for judgment of acquittal. See 6/11/96 Op. Page argued that the conviction should be overturned because the victim's beating occurred entirely at his home in Columbus, and "there was no evidence presented at trial that he assaulted or caused Carla Scrivens any bodily injury during the 3—4 hour trip to Pennsylvania." Id. at 3. The court disagreed, stating that "[t]here is no evidence whatsoever that Congress somehow sought to exclude from the Act's protection domestic violence victims who had the misfortune of being beaten before, as opposed to after, their transportation across state lines." Id. at 5-6. The district court acknowledged that § 2261(a)(2) "does require there to be a nexus or relationship between the forced interstate transportation and the infliction of bodily injury." Id. at 6. The district judge concluded that the requisite nexus was present because "there was more than sufficient evidence that the attack on Ms. Scrivens in Columbus, Ohio, and her subsequent transportation to Washington, Pennsylvania, was (sic) all part of a single episode or series of events." Ibid.

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[5]A first trial ended in a hung jury on both charges.

This Court (Merritt, Wellford [conc.]; Moore [diss.] reversed. 1998 WL 54382. The Court held that § 2261(a)(2) "targets violence that occurs during, or as a result of, interstate travel," and that "[t]he statute's language simply does not appear to reach violent acts that occur before interstate travel begins." 1998 WL 54382 at 3. Under the majority's reading, "domestic violence occurring before (interstate] travel commences --must be excluded." Ibid. The panel therefore rejected the district court's view that Page was subject to prosecution under the VAWA because the battery and the subsequent interstate travel were "all part of a single episode or series of events." Ibid.[6]

Judge Moore dissented. She found that § 2261(a)(2) "reaches the forcing of an intimate partner across state lines where such transportation is integrally related to a prior beating, even if that beating occurs before transportation commences." 1998 WL 54382 at 11. Judge

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[6]The panel agreed with the government's alternative theory that Page was subject to prosecution under § 226 1(a)(2) because threats he had made against Ms. Scrivens during the trip from Ohio to Pennsylvania were themselves "crime[s] of violence" within the meaning of that section and that Ms. Scrivens could reasonably be found to have suffered "bodily injury" as a result of those threats if their effect was to prevent her from seeking medical attention more expeditiously. 1998 WL 54382 at p. 4-5. The case was remanded for retrial so that theory alone could be presented to the jury.

Moore's dissenting opinion suggested two distinct ways in which the beating of Ms. Scrivens was linked to the subsequent interstate transportation. First, Judge Moore observed that,

> (t)he crime of violence that took place inside Page's condominium -- the beating and the use of a stun gun and mace -- is precisely what enabled Page to force Scrivens to undergo the travel across state lines. The beating subdued his victim, rendered her in no condition to resist him physically as she was being placed into his car, and frightened her so severely that she agreed not to make any "commotion" that might attract attention and aid from others once they got outside of his condominium.

Id. at 13. Second, Judge Moore observed that "evidence presented to the jury showed that Page removed Scrivens from the local area precisely because he feared the consequences of his having harmed her and knew that interstate travel would make it more difficult for police authorities to hold him liable for the crime." Ibid. She found it "difficult to believe that Congress intended to exclude from this statute's purview the beating of an intimate partner by a batterer who then forcibly transports his victim across state lines under threat of further violence in order to avoid detection from the law." Ibid.

ARGUMENT

THE DEFENDANT IN THIS CASE, WHO ASSAULTED AND BEAT HIS GIRLFRIEND UNTIL SHE WAS UNABLE TO WALK, THEN IMMEDIATELY FORCED HER TO TRAVEL WITH HIM ACROSS STATE LINES, WAS SUBJECT TO PROSECUTION UNDER 18 U.S.C. § 2261(a)(2), PART OF THE INTERSTATE DOMESTIC VIOLENCE STATUTE IN THE VIOLENCE AGAINST WOMEN ACT

The VAWA provides, inter alia, that,

> [a) person. who causes a spouse or intimate partner to cross a State line or to enter or leave Indian country by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner shall be...

subject to criminal penalties. U.S.C. § 2261(a)(2). As demonstrated herein, the intention of this statute is not supported by its language, its purpose or its application in other jurisdictions. This case of first impression should be reheard by the panel based on this Petition. Given the importance of the issue, it should be reheard by the Court en banc.

A. The Unambiguous Language of the Interstate Domestic Violence Statute Can be Read Without Resort To The Legislative History

An issue raised by defendant in his appeal brief was whether the statute was constitutionally applied to him under a Commerce Clause analysis. That Constitu-tional question filled both parties' briefs and dominated the oral argument.

The focus changed entirely in the majority opinion.[7] It assumed, without discussion, that the statute was ambiguous and proceeded to apply the "rule of lenity" and to examine legislative history. Maj. Op. at 3.

The 'rule of lenity' does not apply unless a statute is ambiguous. United States v. Lanier, ___ U.S. ___, 117 S.Ct. 1219, 1225 (1997). "It is an axiom of statutory construction that resort to legislative history is improper when a statute is unambiguous." Lucas v. Lucas, 924 F.2d 597, 600 (6th Cir. 1991). A statute is not ambiguous merely because courts and parties disagree over the meaning of statutory language. See, e.g., Lucas at 600—601 (while acknowledging that there was a split in interpretation among

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[7]The concurring and dissenting opinions touched on the Constitutional question but neither opinion pivoted on constitutional considerations.

the courts which had considered the statutory language at issue, the Sixth Circuit found that the language was "clear and unambiguous"); United States v. Bender, 134 F.3d 787 (6th Cir. 1998) (court should not go to extreme lengths to characterize criminal statutes as ambiguous when they can be read as relatively well-defined'). No other Circuit has had an occasion to consider the interpretation of the statute[8] advanced by the defendant and accepted by two judges of this Court.

More importantly, "[i]n the absence of a clearly expressed legislative intention to the contrary, 'the language of the statute itself must ordinarily be regarded as conclusive. '" Burlington Northern R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987) (citations omitted); Bradley v. Austin, 841 F.2d 1288 (6th Cir. 1988). While the legislative history supports the government's interpretation of the statute, it can hardly be described as "clearly expressed." On the other hand, given rules of statutory construction and grammar, there is no ambiguity in the plain meaning of the statute.

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[8]However, the argument was recently advanced in a case involving the similarly worded statute regarding 'interstate violation of protection orders,' (18 U.S.C. § 2262) passed at the same time as the statute at issue herein. The Fourth Circuit rejected the argument without much comment. United States v. Romines, 1998 WL 110152 (4th Cir. 3/13/98)(unreported).

The interstate domestic violence statute states in part that, "[a] person who causes a spouse or intimate partner to cross a State line ... by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence..." (emphasis added) It is the underlined language which has caused the division in the panel's decision. Without any grammatical analysis, the majority opinion holds that the phrase "that conduct" means "such travel" (Maj. Op. at 3—4) and thereby excludes from its reach an assault which occurs immediately before the travel even if the assault supplied the force' needed to cause an intimate partner to accompany her assailant across state lines far from the safety of family, friends and law enforcement. The majority further holds that 'in the course of' means 'during' and as a result of 'means after'. As discussed below, Congress knew how to say during 'and after' and failed to retain those terms in the statute as passed. The terms used are much broader than during' or 'after', particularly when used with the term 'that conduct'.

Grammatically, a term such as 'that conduct' must refer back to something which proceeds it in the statute. See e.g., United States v. Yip, 930 F.2d 142 (2nd Cir. 1991). 'That conduct' refers not just to interstate travel, but to forced or coerced interstate travel' or to travel induced by duress or fraud. Where the force used to cause interstate

travel involves an assault which causes bodily injury, then the action is criminalized by 18 U.S.C. § 2261(a)(2).

There are several rules of statutory construction which aid in the reading of this statute. First, where Congress includes particular language in one section of a statute or act but uses different language in another section of the same statute or act, it is generally presumed that Congress acts intentionally and purposely in the disparate treatment. United States v. Russello, 464 U.S. 16 (1983). All but one section[9] of Chapter 110A of Title 18 was passed at the same time and includes sections 2261 through 2266. Three of the sections, §§ 2261, 2261A and 2262 contain similar provisions and parallel language addressing, respectively, interstate domestic violence, interstate stalking and interstate violation of protection orders. In § 2261(a)(1) and § 2261A, the statute applies when the act occurs "in the course of or as a result of such travel", unlike § 2261(a)(2) and § 2262(a)(2) where it applies "in the course or as a result of that conduct." Despite this difference, the majority opinion reads "that conduct" to mean "interstate travel." As in Russello, had Congress intended to restrict § 2261(a)(2) to activity during travel', it presumably would have done so expressly as it did in statutory sections surrounding the statute at issue. 464 U.S. at 299. Russello

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[9]Section 226 IA, 'interstate stalking' was added in 1996.

refrained from concluding that differing language in two related sections had the same meaning in each. Id.

Second, words are presumed to have the same meaning in all subsections of the same statute. Lucas, supra, at 601. In United States v. Romines, supra., an assailant challenged the applicability of 18 U.S.C. § 2262(a)(2), interstate violation of a protection order, to his conduct under the same facts as in the Page case. The beating took place in Tennessee where Romines then forced his terrified spouse into her car and drove her and their baby into Virginia. There were threats during the transportation, but no further injuries were inflicted after the transportation began. The Fourth Circuit held:

> As the Government points out, the plain language of the statute makes it clear that there is no requirement that the victim be harmed in Virginia. Rather, the evidence presented by the prosecution was sufficient to show that Romines injured the victim in the course of forcing her to cross from Tennessee into Virginia, by beating, choking, and threatening her and her son with violence.

Romines at 2 (Addendum B, hereto). If this Circuit is going to construe a parallel statutory provision (which troubled a sister circuit not at all) in an entirely different

fashion, it should only go down that path after full consideration by all judges of this Court.

B. The Legislative history, Which Was Not Briefed by the Parties, Supports the Government's Use of the Statute to Convict the Defendant

The briefs in this case addressed two issues concerning the reach of 18 U.S.C. § 2261(a)(2): its constitutionality under the Commerce Clause and its meaning according to the language of the statute. The majority opinion, however, relies heavily on the legislative history of the statute. Since neither party addressed the legislative history in its brief or at oral argument, the rather lengthy legislative history of this statute has not been fully spread out before the Court. Given that this is a case of first impression, the full Court should have the opportunity to consider the entire legislative history if it is deemed to be a necessary interpretative aid. However, the Court should not resort to legislative history to cloud statutory text that is clear. United States v. Ratzlaf, 510 U.S. 135 (1994).

However, assuming arguendo, that the statute is found to be ambiguous, a full review of the legislative history supports the government's use of the statute to indict and convict the defendant. The majority opinion states that the "statute, as originally proposed in 1990, was much broader than the present version." Maj. Op. at 9. While it

is true that the final version of the statute has more stringent standards as to the definition of the 'domestic violence' that is covered,[10] it has a much broader description of how and when the abuse occurs. The 1990 version, Senate Bill 2754, stated that the "act that injures" must occur "during the course of any such travel or thereafter", S.Rep. No. 101—545, 1990 WL 201794 (Leg. Hist.) at 53, while the statute as passed into law provides that the "crime of violence" must occur "in the course or as a result of that conduct." This shows that Congress knew how to restrict this statute to conduct which occurred during or after interstate travel, but chose not to do so. While the facts of this case do not fit in the narrow early draft of the statute, they are covered by the law as passed.

The majority opinion concludes, again relying on legislative history, that the term "that conduct" refers only to "interstate travel." Maj. Op. at 10. In support, the opinion quotes from the "Discussion" section of Senate Report 103—138 regarding the 1993 version of what eventually became Chapter 110A of Title 18[11] but the

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[10]Originally 'an act that injures his... spouse' was all that was required. The final version requires an intentional 'crime of violence' which causes 'bodily injury.'

[11]It is important to note that there is no discussion of the final version as it was passed into law in 1994 because the changes appear in Conference Reports which do not memorialize the

quote is incomplete. The full quote is:

> (T]itle II creates a Federal remedy for interstate crimes of abuse including crimes committed against spouses or intimate partners during interstate travel and crimes committed by spouses or intimate partners who cross State lines to continue the abuse.

1993 WL 355617 at 140—141 (Leg.Hist.).

This comment does not "demonstrate that Congress intended the term that conduct' to refer only to interstate travel and not to conduct occurring before such travel." Maj. Op. at 8. First, the comment encompasses several proposed statutory sections (now 18 U.S.C. § 2261 and § 2262) and, of course, both subsections of 18 U.S.C. § 2261, not just subsection (a)(2) which is at issue herein. That is important because, as is discussed above, 18 U.S.C. § 2261(a)(1) includes the phrase "in the course of or as a result of such travel." Second, the comment refers to a very broad intention to "create[] a Federal remedy for interstate crimes of abuse including crimes committed, during interstate travel... ." (emphasis added). This

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reasons, set forth the purpose or do a section-by-section analysis of the bill. See, H.R. Conf. Rep. 103-694, 1994 WL 422728 (Leg.Hist.), H.R. Conf. Rep. 103-711, 1994 WL 454841 (Leg Hist.).

explanation does not limit the statutory language to crimes which occur during interstate travel, but says merely that it includes them. Finally, it directly covers the fact situation in Page when it states that it includes "crimes committed by spouses or intimate partners who cross State lines to continue the abuse." Significantly, it does not say that the interstate travel is undertaken to commit new abusive acts which is what the majority opinions would require.

Finally, the majority opinion makes an unsupported statement that "Congress rejected the broad proposal and chose to limit the scope of the statute" because they were "[c)oncerned about encroaching upon the traditional jurisdiction of the states over domestic relations matters.... Maj. Op. at 7. Despite an exhaustive search of the Congressional Record, no support could be found for that statement. On the contrary, most Senators and Congress-persons spoke in support of involving the federal courts in law enforcement efforts as part of an over-all plan of attack on this national problem. See e.g., 140 Cong.Rec. H10693—01, 1994 WL 545675; 140 Cong.Rec. S12496—01 at S12526, 1994 WL 461455; 140 Cong.Rec. S12399—03 at S12402, 1994 WL 460054; 140 Cong.Rec. H55180—01, 1994 WL 287892; 139 Cong. Rec. S14011—07 at S14016, 1993 WL 420256.

C. Importance of the Question Presented Extends Far Beyond This Case and This Circuit and Should Not Become the Law of This Circuit By a Divided Panel Decision

In May, 1996, United States Attorney General Janet Reno testified before the Senate Judiciary Committee to discuss the VAWA[12] two years after its passage into law. 1996 WL 256684 (F.D.C.H.). The statute at issue in this case, although it is just one small part of the VAWA , was mentioned twice during the 10 pages of testimony:

> Before the Violence Against Women Act, a batterer who brutally beat his partner and then drove her across state lines to leave her at the hospital, would likely escape prosecution because of jurisdictional problems. Today, these batterers are prosecuted, convicted, and sent to jail for years because of the newly created federal crime of interstate domestic violence.
>
> * * *
>
> We have used these provisions to insure that batterers did not slip through the cracks in the criminal justice system with the same ease that they slipped across state lines.

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[12]Appropriations for other provisions of the VAWA at the time of its passage totaled $1.6 billion. See, 140 Cong. Rec. S 12496-01 at 12534.

Id. The Attorney General went on to note that more than a dozen cases had been brought successfully and to discuss two of them at length. She discussed the facts in United States v. Steele, Case No. Cr-S-95-327-WBS (N.D CA, 1996) (described in Addendum A hereto) which involved an assault in Oregon, the victim's attempt to escape and the defendant's arrest in California:

> California state prosecutors were worried about their ability to prosecute Steele successfully, as there was no clear assault in California. Local law enforcement in Oregon indicated that Steele was not likely to get more than a year in prison if found guilty under its state law for the assaults. ...(W)e prosecuted Steele in federal court... . Steele was sentenced to 87 months in prison.

Id. She then discussed the Page case and noted that with the victim, medical witnesses and evidence in Pennsylvania, local prosecutors in Ohio faced difficult evidentiary problems in pursuing prosecution. It was further noted that in Pennsylvania, local prosecutors could not proceed because no criminal conduct had occurred in that state, but that federal prosecution under the new statute was successful. Id.

1. The Difficulty of Prosecuting Interstate Crimes of Violence Is the Hard to Be Remedied By The Statute. This Purpose Is Defeated By The Panel's Decision.

In describing the domestic violence problem which necessitated the legislation in the first place, Attorney General Reno quoted from the most recent figures from the Department's Bureau of Justice Statistics. To summarize, in 1993 and 1994, women age 12 and older annually sustained almost 5 million violent victimizations with nearly one-third of the women who experienced such violence at the hands of an intimate being victimized again during the same year. These figures are significant because 60% of the violence against women was perpetrated by offenders the victim knew. Id. The panel's decision in this case will allow abusers in all circuits to argue against federal prosecution where the attack itself ended before the transportation began. Given the difficulties of state prosecution in interstate crimes of domestic violence, the line drawn by the majority opinion to prevent the statute's application when the bodily injury occurs before, but enables, the interstate transportation is an artificial and meaningless distinction. See, e.g. facts of cases in Addendum A.

Judge Wellford's concurring opinion which refers to the federal courts' traditional reluctance to become involved

in ~domestic relations' cases misses the mark. These are not prenuptial agreements, division of property disputes, or custody decisions but cases of pure violence involving abduction, permanent bodily injury, coma, and death. Why should the victims of these awful crimes have to commence travel before the crime of violence occurs when in a fraud scheme involving interstate travel the persons travel can occur at any point before, during or after the fraudulent act. 18 U.S.C. § 2314, second paragraph. See, also, the Mann Act, 18 U.S.C. § 2421; the kidnaping statute, 18 U.S.C. § 1201(a) (1); and the Travel Act, 18 U.S.C. § 1952.

2. This Case Presents the Most Common Fact Situation Under the Statute, Thus This Split Decision Has Removed An Important Law Enforcement Tool

In this case of first impression, this circuit has had an opportunity to interpret this important criminal statute. Unfortunately for victims of interstate domestic violence in the Sixth Circuit, now many of their abusers will not be prosecuted under this statute and the victims will not receive the many benefits of the statute including restitution.'[13] See,, United States v. Hayes, 135 F.3d 133

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[13]The victim in the Page case was awarded restitution for not only medical expenses but also for the destruction of all her belongings since that destruction was part of the ruse that got her to go to Page's condominium the night she was assaulted.

(2nd Cir. 1998) (discusses restitution under the statute.) Even though the victim is transported interstate against his or her will, receives a physical injury from a crime of violence, and has witnesses and evidence in another jurisdiction, there will be no federal prosecution in the Sixth Circuit if the injury occurred entirely before the interstate transportation.

A quick review of prosecutions under § 2261(a) (2) shows that the facts in Page are apparently the most common interstate scenario when intimate partners turn violent. Nationwide, fifteen cases have proceeded to at least conviction, plea or indictment where one of the crimes charged was 18 U.S.C. § 2261(a)(2).'[14] Based on the rationale of the Page decision, the list attached hereto as Addendum A has attempted to categorize such cases according to the timing of the injury: 1) before the transportation; 2) before the transportation with additional injury during or after the transportation; 3) during and/or after the transportation. As seen by the chart and the facts of the cases, 7 of 15 cases found to be prosecutable have involved the same facts as Page. There is no difference

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[14]The number of prosecutions under this section of the VAWA's domestic violence statutes should alleviate any fear that the courts will be inundated with domestic violence cases. It is still only the exceptional case which requires and merits federal prosecution.

among the cases in the need for federal investigation and prosecution and the Sixth Circuit now stands alone in making a distinction. Such a result should not be based on a deeply divided panel decision.

CONCLUSION

For all of the foregoing reasons, this Court should grant the government's Motion for Rehearing with Suggestion for Rehearing En Banc.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The foregoing United States Petition for Rehearing with Suggestion for Rehearing En Banc was served by regular U.S. mail on the 30th day of March, 1998, on Thomas W. Tyack, Attorney for Defendant-Appellant Derek Duane Page, Tyack, Blackmore & Liston Co., L.P.A., 536 South High Street, Columbus, OH 43215.

/s/ Deborah A. Solove
DEBORAH A. SOLOVE (0024552)
Assistant United States Attorney

ADDENDUM A

I. Injury, then transportation without new injuries[1]

1. United States v. Hornsby, 88 F. 3d 336 (5th Cir. 1996) [Victim beaten in Texas, then transported to Louisiana.Defendant was charged with kidnaping and interstate domestic violence. Result: guilty plea to 18 U.S.C. § 2261(a) (2)].

2. U.S. v. Bailey — 112 F.3d 758 (4th Cir. 1997) [Victim was beaten in West Virginia, then transported in trunk of car for three days in and out of West Virginia and is now in permanent vegetative state. Defendant was charged with kidnapping and interstate domestic violence, 18 U.S.C. § 2261 (a)(2). Result: Convicted on both counts.]

3. U.S. v. James, CR—96—088—PCT—EHC (D.AZ, 1996)
[Victim was assaulted on Indian country and transported off the reservation. Defendant was charged with 18 U.S.C. § 2261(a)(2) and kidnaping. Result: Acquitted of interstate domestic violence and

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[1]There have been several other cases presented, but prosecution was dismissed when the victim disappeared

convicted of kidnapping. In response to jury question whether injury needed to be before, during or after transportation, judge said that any one would satisfy statute.]

4. United States v. Steele, CR—S—95—327 WBS(N.D. CA, 1996)
[Victim was beaten in Oregon, then defendant began trip with victim against her will to Las Vegas to get married. She attempted escape in California and defendant was arrestEd. Result: Guilty plea to 18 U.S.C. § 2261(a) (2).]

5. United States v. Helem, 7:97—CR—33—1H2 (E.D. NC, 1997)
[Victim was beaten in Maryland. Defendant withheld medicaL treatment and began forced transportation to Florida, but later left her at hospital in North Carolina. Result: Convicted of 18 U.S.C. § 2261(a) (2)]

6. United States v. Covington, CR—97—58 (E.D. OK, 1997)
[The victim and defendant were divorced parents of a baby. The victim was beaten at her home in Oklahoma, then defendant took her and the baby to Texas. He put a knife to her throat in transit, but no

further injury. He was charged with interstate domestic violence under 18 U.S.C. § 2261(a)(2) and kidnaping. Result: Still awaiting trial.]

7. United States v. Page, F.3d, 1998 WL 54382 (6th Cir. 1998)

[Defendant beat his ex-girlfriend in Ohio, then transported her to Pennsylvania, threatening her with further violence along the way. Indicted for kidnaping and interstate domestic violence. Result: Acquitted of kidnapping and convicted of 18 U.S.C. § 2261(a)(2), reversed and remanded.)

II. Injury, then transportation with additional injuries or violence during or after the transportation;

1. United States v. Cree, CR—97—39—01 (D.ND, 1997)

[Defendant beat his intimate partner, then transported her, then raped her, then returned her back to Indian country. Result: Convicted of 18 U.S.C. § 2261(a) (2).]

2. United States v. Olvera, Cr—S—97—358 LKK (E.D. CA, 1997)

[The victim lived in Oregon where she was assaulted. Defendant then transported her to

California where there was some evidence that she tried to escape and he pulled her back into the car by her hair. Defendant was charged under: 18 U.S.C. § 2261(a) (1) and (2) and other charges. Result: Guilty plea to other charges.]

3. United States v. Prue, CR97—30042 (D.SD, 1997)
[Defendant beat his girlfriend and forced her into a car and transported her out of Indian country where he then tried to throw her of f a bridge but she escaped. Result: Convicted of 18 U.S.C. § 2261(a) (2)]

III. Injury during and/or after the transportation

1. United States v. Frank, 97—CR—269(DC) (S.D.NY, 1997)
[The intimate partner was a witness against defendant. He transported her from Connecticut to New York, locked her in the trunk of the car and set it on fire, killing her. He has been indicted under 18 U.S.C. § 2261(a) (2) with death penalty specifications. Result: Trial date in June 1998.]

2. United States v. Ruggles, 97—10—B (E.D. Ky. 1997)

[After months of harassment by defendant, the victim was forced to travel from Kentucky to Florida where she was sexually assaulted by the defendant and his friend. Defendant was charged with interstate stalking, interstate violation of a protective order and interstate domestic violence, 18 U.S.C. § 2261(a)(2). Result: Conviction on all charges on 12-5—97.]

3. United States v. Venecia, CR96—449—FR (D.OR 1996)

[Defendant forced his live-in girlfriend to travel from Oregon to Washington. He raped her en route and then forced her to drive while he choked and hit her. He was indicted under both 18 U.S.C. § 2261(a) (2) and kidnaping. Result: Guilty plea to kidnaping.)

4. United States v. Hendren, 5:96CR31—V (W.D. NC, 1998)

[Defendant carjacked his victim and took her from North Carolina to Virginia and back. Sometime during the trip, the victim was sexually assaulted. Result: Defendant pled guilty to a violation of 18 U.S.C. § 2261(a)(2).]

5. United States v. Williams, 2:97CR200024—Ool(W.D. Ark. 1998)

[Defendant forced his ex—girlfriend and mother of his children to travel from Arkansas to Oklahoma. While driving, he hit her and the baby. He was indicted under 18 U.S.C. § 2261(a)(2). Result: guilty plea to interstate domestic violence.]

ADDENDUM B

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Slip Copy
Unpublished Disposition

(Cite as: 1998 WL 110152 (4th Cir. (Va.)))

NOTICE: Fourth Circuit Local Rule 36(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Fourth Circuit.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A TABLE PUBLISHED PERIODICALLY.

UNITED STATES of America,
Plaintiff—Appellee,
v.

William Ronnie ROMINES,
a/k/a William Ronnie Mikels, a/k/a
Ronnie William Mikels,
a/k/a William Ronnie Romine,
a/k/a Ronnie Ramine,
Defendant—Appellant.

No. 96—4838.

United States Court of Appeals, Fourth Circuit.

Submitted Jan. 30, 1998. Decided March 13, 1998.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. James C. Turk, District Judge. (CR-95-52-A)

Daniel R. Bieger, Copeland, Molinary & Bieger, P.C., Abingdon, Virginia, for Appellant. Robert P. Crouch, States Attorney, Rick A. Mountcastle, Assistant United States Attorney, Abingdon, Virginia, for Appellee.

Before WILKINS and MOTZ, Circuit Judges, and HALL, Senior Circuit Judge.

OPINION

PER CURIAM:

***1** William Ronnie Romines appeals his jury convictions of one count of kidnapping in violation of 18 U.S.C. § 1201(a)(1) (1994), one count of interstate violation of an order of protection in violation of 18 U.S.C. § 2262(a)(2) (1994), and one count of interstate transportation of a stolen motor vehicle in violation of 18 U.S.C. § 2312 (1994). We affirm.

Romines first contends that the evidence was insufficient to support his conviction of kidnapping.his estranged wife, Shannon Romines. To support a conviction, "the evidence, when viewed in the light most favorable to

the government, must be sufficient for a rational trier of fact to have found the essential elements of the crime beyond a reasonable doubt." United States v. Brewer, 1 F.3d 1430, 1437 (4th Cir.1993). Circum-stantial as well as direct evidence is considered, and the government is given the benefit of all reasonable inferences from the facts proven to those sought to be established. United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir.1982).

To sustain a conviction under the federal kid-napping statute, the Government must establish four essential elements: "1) the transportation in interstate commerce; 2) of an unconsenting person who is; 3) held for ransom, reward or otherwise, and 4) the acts were committed knowingly and willingly." United States v. Osborne, 68 F.3d 94, 100 (5th Cir.1995). Romines maintains that the prosecution presented insufficient evidence at trial to support his conviction for kidnapping because it failed to show that the victim was taken against her will or that Romines held the victim for "ransom, reward or otherwise." This contention is meritless because the evidence disclosed Romines' motive for holding his estranged wife and amply supports the jury's finding that she did not consent to go with him. [FN1] The evidence at trial disclosed that on November 1, 1995, several months after the couple separated, Romines appeared at his wife's residence following a heated argument over the telephone in which he had become abusive. When his wife, who was outside on a porch, attempted to enter the house with the couple's two year-old baby, Romines grabbed her by the hair to prevent her from closing the door. Romines then followed his wife and child into the house and into a back bedroom, where a struggle ensued as his wife tried to push Romines out of the room. Romines beat his wife, blackening both of her eyes.

He then picked up the baby and headed to the front door with his wife following behind.

The victim testified she tried to hit Romines with a glass object but missed. Romines then told her to put on her shoes so they could leave. After a heated exchange, Romines choked his wife until she urinated on herself and nearly lost consciousness, telling her that he could kill her if he wanted. At some point while he was in the house, Romines went to his wife's parents' bedroom and took the keys to her recently leased Mazda 626.. As they left the house, the victim attempted to run away with the baby. However, Romines took the baby from her and put him in her car. The victim testified that she got into the car because he had the baby and because she believed she did not have a choice. In the car, Romines took out a pocket knife and cut the side of the car's seat, remarking "See how sharp it is."

*2 Romines drove his wife and baby out of Knoxville, Tennessee, on the interstate highway and made at least four stops. He first stopped to call his sister and asked her to pick up some clothes and personal items for the victim. He also allowed his wife to call her mother, but forced her to give a false location and say that she was with Romines willingly. Following Romines' instructions, his wife also told her mother that she intended to stop the divorce proceedings and rescind the order of protection. The victim testified that she said these things because she was afraid of Romines.

At the second stop, Romines forced the victim to call her attorney and tell him she no longer wanted a divorce. At the third stop, Romines called his sister, who reported that

the police were at his wife's house. Romines told the victim to call her father, a police officer, to have him call off the police. At the fourth stop, still in Tennessee, Romines allowed the victim to go into a truck stop to buy a map and to obtain directions to a WalMart while he kept the baby in the car. He then caught her trying to pass her father'E; phone number to a clerk arid eventually forced her back to the vehicle by threatening 1:0 kill their baby. Although Romines had promised to take his wife to a McDonald's to meet her father, he drove away in the opposite direction, crossing the state line into Virginia. State troopers then stopped the vehicle. However, Romines pulled away as the troopers approached. After a high speed chase, Romines fled on foot and was finally apprehended.

In challenging the sufficiency of the evidence of kidnapping, Romines cites evidence of a note his wife wrote during the kidnapping in which she promised not to put him in jail and stated that she had left with him willingly and later changed her mind. This challenge is meritless, however, because
the victim testified at trial that she wrote the note under duress and to convince Romines to release her and the baby. Accordingly, we conclude that the facts disclosed at trial support the jury's finding that Romines kidnapped his wife against her will in order to coerce her to stop divorce proceedings, rescind the order of protection, and resume their married life.

Romines next challenges the sufficiency of the evidence to sustain his conviction of interstate violation of a protective order. To support a conviction for interstate violation of a protective order, the prosecution must show that (1) Romines caused. the victim to cross a State line, (2)

by force, coercion, duress, or fraud, and (3) in the course or as a result of that conduct he intentionally committed an act that injured the victim, (4) in violation of a valid order of protection issued by a State. See 18 U.S.C. § 2262(a)(2) (1994).

Romines first argues that the evidence is insufficient because the victim testified that she willingly left with Romines. This argument is without merit, as the evidence clearly supports a finding that the victim went with Romines because he had their son and she feared for his safety. Second, Romines
contends that the prosecution's case lacked evidence that any violence occurred in Virginia or that Romines had any intention of harming his wife in Virginia. We find this contention lacking in merit as well. As the Government points out, the plain language of the statute makes it clear that there is no requirement that the victim be harmed in Virginia. Rather, the evidence presented by the prosecution was sufficient to show that Romines injured the victim in the course of forcing her to cross from Tennessee into Virginia, by beating, choking, and threatening her and her son with violence. (FN2)

*3 Romines next takes issue with his conviction for interstate transportation of a stolen motor vehicle. To sustain a conviction for this offense, the Government must show that (1) there was a stolen motor vehicle, (2) that Romines knew it was stolen, and (3) that he transported it in interstate commerce. United States v. Chorman, 910 F.2d 102, 110 (4th Cir.1990). Romines contends that the vehicle was not stolen because, under Tennessee law, a husband cannot: steal his wife's property. We reject this contention, as the evidence showed that the victim leased

the vehicle in her name only after the couple separated. The evidence was otherwise sufficient to sustain the conviction.

Finally, Romines maintains that the vehicle could not have been stolen because the evidence was insufficient to establish that the victim was taken against her will. We reject this contention because the evidence was sufficient to show that the victim did not willingly leave with Romines. We therefore affirm Romines' convictions and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

AFFIRMED

FN1. We note that our decision in United States v. Childress, 26 F.3d 498 (4th Cir.1994), may cast doubt on whether the prosecution was required to prove the motivation of the kidnapping as an element of the offense. Id. at 502—03 n. 3. We need not address that here, however, as the evidence was sufficient to support a finding that Romines held his wife in an attempt to coerce her to stop divorce proceedings, rescind an order of protection, and reconcile with him.

FN2. The order of protection in question was entered by agreement of the parties on August 31, 1995, and enjoins Romines from abusing or threatening to abuse his wife or committing any acts of violence against her. In his brief, Romines tangentially mentions his challenge below to the

validity of the order because of a clerical error on page two which would show the order to have expired the day before it was entered. We find that adequate evidence established the order of protection in question was valid at the time of the offense.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER GRANTING PETITION *EN BANC*

Sixth Circuit Case Nº. 96-4083
Filed May 21, 1998

Pages C-1 thru C-2

96-4083

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	**ORDER**
DEREK DUANE PAGE, Defendant-Appellant.	)	

BEFORE: MARTIN, Chief Judge, MERRITT, KENNEDY, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges.

A majority of the Judges of this Court in regular active service have voted for rehearing of this case *en banc*. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing *en banc* shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal.

Accordingly, it is **ORDERED**, that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

It is further **ORDERED** that the appellant file a supplemental brief not later than Monday, June 22, 1998, and the appellee file a supplemental brief not later that Wednesday, July 22, 1998. The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as possible.

ENTERED BY ORDER OF THIS COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION & STATUTES INVOLVED

Sixth Circuit Case Nº. 96-4083
Filed February 12, 1998

Pages D-1 thru D-49

(To be reported at: 136 P.3d 481)
(Cite as: 1998 WL 54382 (6th Cir.(Ohio))

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DEREK DUANE PAGE,
Defendant-Appellant.

No. 96-4083.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Argued: October 23, 1997

Decided and Filed: February 12, 1998

Following jury trial, defendant was convicted in the United States District Court for the Southern District of Ohio, Dlott, J, of interstate domestic violence under Violence Against Women Act. After denial of his motion for judgment of acquittal, defendant appealed. The Court of Appeals, Merritt, Circuit Judge, held that: (1) as matter of first impression, section of Act forbidding domestic violence during or as result of interstate travel did not extend to acts of violence occurring before interstate travel; (2) jury was not adequately instructed on theory that continuation or aggravation of preexisting injuries could constitute bodily injury; (3) prohibition on acts of domestic violence

during or as result of interstate travel was within Congress' authority under Commerce Clause; and (4) district court did not abuse its discretion in making evidentiary rulings.

Reversed and remanded.

Wellford, Circuit Judge, filed concurring opinion.

Moore, Circuit Judge, concurred in part, dissented in part, and filed opinion.

[1] ASSAULT AND BATTERY ⇒48 37k48

Statute prohibiting person from causing spouse or intimate partner to cross state line by force, coercion, duress, or fraud and, in course or as result of that conduct, intentionally committing crime of violence and thereby causing bodily injury to spouse or partner does not encompass situation in which act of violence occurred before interstate travel under either "single episode" or "continuing assault" theory asserted by government. (Per Merritt, Circuit Judge, with one Judge concurring and one Judge concurring in part and dissenting in part.) 18 U.S.C.A. § 2261(a)(2).

[2] ASSAULT AND BATTERY ⇒48 37k48

Threats of violence may constitute "crime of violence" for purposes of statute forbidding domestic violence during or as result of interstate travel, although prosecution still must prove that these intentional acts of violence caused bodily

injury to defendant's spouse or intimate partner. (Per Merritt, Circuit Judge, with one Judge concurring and one Judge concurring in part and dissenting in part.)
18 U.S.C.A. § 2261(a)(2).

[3] ASSAULT AND BATTERY ⇒48 37k48

Aggravation of injuries inflicted before travel interstate may constitute "bodily injury" for purposes of statue forbidding domestic violence during or as result of interstate travel, but to establish violation of statute, prosecution still must prove that defendant's intentional acts during interstate travel caused such aggravation; where only bodily harm sustained during interstate travel was worsening of prior injury, prosecution must prove that, during or as result of interstate travel, defendant intentionally committed crime of violence and thereby caused such aggravation. (Per Merritt, Circuit Judge, with one Judge concurring and one Judge concurring in part and dissenting in part.) 18 U.S.C.A. § 2261(a(2).

[4] ASSAULT AND BATTERY ⇒96(1) 37k96(1)

Although proof presented could sustain verdict that victim incurred "bodily injury' as result of threats of violence made by defendant during several hours of travel to hospital, in prosecution under Violence Against Women Act section forbidding domestic violence during or as result of interstate travel, verdict could not be upheld where jury was not properly instructed on theory that continuation or

aggravation of preexisting injuries could constitute bodily injury. (Per Merritt, Circuit Judge, with one Judge concurring and one Judge concurring in part and dissenting in part.) 18 U.S.C.A. § 2261(a)(2).

[4] ASSAULT AND BATTERY ⇒96(1) 37k96(1)

Although proof presented could sustain verdict that victim incurred "bodily injury" as result of threats of violence made by defendant during several hours of travel to hospital, in prosecution under Violence Against Women Act section forbidding domestic violence during or as result of interstate travel, verdict could not be upheld where jury was not properly instructed on theory that continuation or aggravation of preexisting injuries could constitute bodily injury. (Per Merritt, Circuit Judge, with one Judge concurring and one Judge concurring in part and dissenting in part.) 18 U.S.C.A. § 2261(a)(2).

[4] ASSAULT AND BATTERY ⇒1173.2(2) 110k1173.2(2)

Although proof presented could sustain verdict that victim incurred "bodily injury" as result of threats of violence made by defendant during several hours of travel to hospital, in prosecution under Violence Against Women Act section forbidding domestic violence during or as result of interstate travel, verdict could not be upheld where jury was not properly instructed on theory that continuation or aggravation of preexisting injuries could constitute bodily

injury. (Per Merritt, Circuit Judge, with one Judge concurring and one Judge concurring in part and dissenting in part.) 18 U.S.C.A. § 2261(a)(2).

[5] COMMERCE ⇒82.10 83k82.10

Statute prohibiting acts of domestic violence during or as result of interstate travel was within Congress' authority under Commerce Clause. (Per Merritt, Circuit Judge, with one Judge concurring and one Judge concurring in part and dissenting in part.) U.S.C.A. Const. Art. 1, § 8, cl.3; 18 U.S.C.A. § 2261(a)(2).

[6] ASSAULT AND BATTERY ⇒85 37k85

Evidence that victim of alleged interstate domestic violence, under Violence Against Women Act, was "intimate partner" of person other than defendant was not relevant to whether victim was defendant's "intimate partner," since person could have more than one such partner, and exclusion of evidence was thru not abuse of discretion. (Per Merritt, Circuit Judge, with one Judge concurring and one Judge concurring in part and dissenting in part.) 18 U.S.C.A. §§ 2261(a)(2), 2266.

[7] ASSAULT AND BATTERY ⇒85 37k85

District court did not abuse its discretion in excluding evidence that victim of alleged domestic violence during

interstate travel had been convicted of drunk driving and failed to seek treatment for drug and alcohol dependency as required by her probation order, despite claim that evidence was probative of victim's credibility as witness and would have corroborated defendant's claim that victim was intoxicated and attacked on date in question, as evidence bore little, if any, relevance to issues in case and would likely have prejudiced jury against victim. (Per Merritt, Circuit Judge, with one Judge concurring and one Judge concurring in part and dissenting in part.) 18 U.S.C.A. § 2261(a)(2).

[7] WITNESSES ⇒344(2) **410k344(2)**

District court did not abuse its discretion in excluding evidence that victim of alleged domestic violence during interstate travel had been convicted of drunk driving and failed to seek treatment for drug and alcohol dependency as required by her probation order, despite claim that evidence was probative of victim's credibility as witness and would have corroborated defendant's claim that victim was intoxicated and attacked on date in question, as evidence bore little, if any, relevance to issues in case and would likely have prejudiced jury against victim. (Per Merritt, Circuit Judge, with one Judge concurring and one Judge concurring in part and dissenting in part.) 18 U.S.C.A. § 2261(a)(2).

Deborah A. Solove (argued and briefed), Office of the U.S. Attorney, Columbus,OH, for Plaintiff-Appellee.

Thomas M. Tyack (argued and briefed), Tyack, Blackmore & Liston, Columbus, OH, for Defendant-Appellant.

Before: **Merritt, Wellford,** and **Moore**, Circuit Judges.

MERRITT, J, delivered the opinion of the court. WELLFORD, J. (pp.___-___), delivered a separate concurring opinion. MOORE, J. (pp.___-___), delivered a separate opinion concurring in part and dissenting in part.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Electronic Citation: 1998 FED App. 0054P (6th Cir.)
File Name: 98a0054p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DEREK DUANE PAGE,
Defendant-Appellant.

No. 96-4083

Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 95-00146--Susan J. Dlott, District Judge.

Argued: October 23, 1997

Decided and Filed: February 12, 1998

Before: MERRITT, WELLFORD, and MOORE, Circuit Judges.

COUNSEL

ARGUED: Thomas M. Tyack, TYACK, BLACKMORE & LISTON, Columbus, Ohio, for Appellant. Deborah A. Solove, OFFICE OF THE U.S. ATTORNEY, Columbus, Ohio, for Appellee. **ON BRIEF:** Thomas M. Tyack, TYACK, BLACKMORE & LISTON, Columbus, Ohio, for Appellant. Deborah A. Solove, OFFICE OF THE U.S. ATTORNEY, Columbus, Ohio, for Appellee.

OPINION

MERRITT, J., delivered the opinion of the court. WELLFORD, J. (pp. 15-19), delivered a separate concurring opinion. MOORE, J. (pp. 20-28), delivered a separate opinion concurring in part and dissenting in part.

MERRITT, Circuit Judge.

The Violence Against Women Act, adopted in 1994, has two criminal provisions, one of which forbids interstate travel for the purpose of committing domestic violence, and the other of which forbids domestic violence during or as a result of such interstate travel. In the direct criminal appeal now before us, the defendant, Derek Page—before traveling interstate—brutally beat and injured his live-in

girlfriend. He injured her in Columbus, Ohio, and then drove her to Washington, Pennsylvania, where he left her for treatment at a hospital. Although the beating occurred entirely in Page's home in Ohio, the prosecution presented evidence that the victim's injuries worsened during the trip to Pennsylvania. This appeal presents two questions regarding the scope of the new statute: first, whether it criminalizes domestic violence that occurs before interstate travel begins; and second, whether it criminalizes intentional violent conduct during interstate travel that results in the aggravation of injuries inflicted earlier.

The precise language of the statute is important. Section 2261(a)(1) criminalizes the actions of a "person who travels across a State line . . . with the intent to injure" a "spouse or intimate partner" and who does in fact injure that person "in the course of or as a result of such travel," and (a)(2) criminalizes the conduct of one who "commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner," "in the course or as a result of" causing him or her "to cross a State line . . . by force, coercion, duress, or fraud."[1] Following the

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[1]The provision in question, 18 U.S.C. § 2261(a), reads in full as follows:

2261. Interstate domestic violence

(a) Offenses.--

longstanding "canon of strict construction of criminal statutes, or rule of lenity, [that] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered," *United States v. Lanier*, — U.S. —, 117 S. Ct. 1219, 1225 (1997) (citing numerous cases), we conclude that this statute does not criminalize domestic violence that occurs prior to interstate travel. Rather, the statute only covers domestic violence occurring "in the course or as a result of" such travel. Interpreted this way, the statute criminalizes the aggravation of injuries inflicted before interstate travel only so long as the worsening of the injuries was caused by intentional violent conduct during interstate travel. Because the jury was not

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(1) CROSSING A STATE LINE.--A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b).

(2) CAUSING THE CROSSING OF A STATE LINE.--A person who causes a spouse or intimate partner to cross a State line or to enter or leave Indian country by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner, shall be punished as provided in subsection (b).

instructed on the proper interpretation of the statute, we reverse the defendant's conviction and remand for retrial.

I.

On November 2, 1995, a grand jury returned a two-count indictment charging Derek Page with kidnapping and interstate domestic violence. His first trial ended in a hung jury. At Page's second trial, the jury acquitted him of kidnapping but found him guilty of interstate domestic violence, in violation of 18 U.S.C. § 2261(a)(2). The District Court denied Page's motion for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c) and sentenced him to fifty-seven months in prison. It is this ruling that Page appeals.

The evidence at trial showed that on the evening of July 24, 1995, Page's live-in girlfriend, Carla Scrivens, visited his condominium in Columbus, Ohio, where a physical confrontation ensued. The prosecution presented evidence that Page sprayed Scrivens with pepper spray and beat her over the course of several hours with his fists, a claw hammer, and a pipe wrench. Approximately two hours after the beating had ceased, Page carried Scrivens to his car and drove her to Washington, Pennsylvania, where he left her in the emergency room of a hospital. The prosecution adduced evidence that Page forced Scrivens to take this journey by threatening her with further violence and with the use of a stun gun. There was also evidence that during the drive to Pennsylvania, Page made additional

threats and that Scrivens's injuries worsened through bleeding and swelling.

II.

Page was convicted under § 2261(a)(2), the scope of which has not been addressed by this or any other appellate court. Conviction under § 2261(a)(2) requires the prosecution to prove that the defendant: (1) caused his or her spouse or intimate partner to cross a state line (2) by force, coercion, duress, or fraud, and (3) in the course or as a result of that conduct, (4) intentionally committed a crime of violence, (5) thereby causing bodily injury to the spouse or intimate partner. On appeal, Page appears to concede that he used coercion, force, or duress to cause Scrivens to travel interstate and that he caused bodily injury to Scrivens during a physical altercation before travel began.

Page's appeal rests on the timing of the violence that caused Scrivens's injuries. Referring to the precise language of § 2261(a)(2), he claims that the prosecution failed to establish that the act of violence that caused bodily injury to Scrivens occurred "in the course or as a result of that conduct." He argues that the term "that conduct" refers to the act of traveling interstate. Accordingly, he contends that the words "crime of violence [causing] bodily injury" require the prosecution to prove that a separate act of violence occurred during or as a result of interstate travel. Page maintains that the violent conduct which caused Scrivens's bodily injuries ceased before he drove her to

Pennsylvania and that no act of violence causing bodily injury to Scrivens occurred during or as a result of the travel. As such, he argues that the statute does not apply.

The prosecution argues that "that conduct" looks both at the acts constituting the interstate travel and at the "force, coercion, duress, or fraud" used in causing the travel. The prosecution relies on a "single episode" theory of the crime, arguing that it makes no difference exactly when the injury occurred. It contends that the term "that conduct" includes Page's beating of Scrivens because this beating "was instrumental in causing the victim's interstate transportation." In other words, the prosecution maintains that the same course of violent conduct that caused Scrivens's bodily injuries also caused her to cross the state line. Under the prosecution's reading, § 2261(a)(2) would reach any instance of domestic violence occurring before interstate travel, provided that there is some link between the violence causing the victim's bodily injury and the force, coercion, duress, or fraud used in causing the victim to cross the state line.

The District Court adopted this reading of the statute in denying Page's motion for a judgment of acquittal, stating that "there is no evidence whatsoever that Congress somehow sought to exclude from the Act's protection domestic violence victims who had the misfortune of being beaten before, as opposed to during or after, their transportation across state lines." Dist. Ct. at 5-6, J.A. at

210-11. The court concluded that although the statute "require[s] there to be a nexus or relationship between the forced interstate transportation and the infliction of bodily injury," such a connection had been established. Dist. Ct. at 6, J.A. at 211. The court held that the prosecution had presented evidence sufficient to allow a reasonable jury to "conclude that the attack on Ms. Scrivens in Columbus, Ohio, and her subsequent transportation to Washington, Pennsylvania, was all part of a single episode or series of events," thus establishing the requisite connection. *Id.*

Section 2261(a) is the product of compromise among contending forces arguing for a broad federal statute outlawing any domestic violence against women that affects commerce and those arguing against the federalization of state domestic relations matters. It is not a model of clarity. Nevertheless, the provision's language fails to support the "single episode" or "continuing assault" theory adopted by the District Court and urged by the prosecution on appeal. Section 2261(a)(1) appears to criminalize the conduct of a person who travels across a state line for the purpose of committing an act of violence on a spouse or partner, and who thereafter commits such an act. Section 2261(a)(2), on the other hand, targets violence that occurs during, or as a result of, interstate travel. The statute's language simply does not appear to reach violent acts that occur before interstate travel begins. We must enforce the statute according to the words that Congress actually adopted and

not according to our own view of what might be a better or more comprehensive statutory policy on domestic violence against women.

The provision's legislative history precludes the "single episode" theory. The statute, as originally proposed in 1990, was much broader than the present version.[2] It proposed to criminalize any domestic violence "in interstate commerce." *See* S. Rep. No. 101-545, at 15 (1990). Concerned about encroaching upon the traditional jurisdiction of the states over domestic relations matters,

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[2]The 1990 proposal stated as follows:

> § 2261. Traveling to commit spousal abuse
>
> (a) IN GENERAL.--Any person who travels or causes another (including the intended victim) to travel across State lines or in interstate commerce and who, during the course of any such travel or thereafter, does an act that injures his or her spouse or intimate partner in violation of a criminal law of the State where the injury occurs, shall be fined not more than $1,000 or imprisoned for not more than 5 years but not less than 3 months, or both, in addition to any fine or term of imprisonment provided under State law.

S. Rep. No. 101-545, at 15 (1990).

and in light of the federal courts' traditional reluctance to federalize this field, *see Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (reaffirming the longstanding domestic relations exception to diversity jurisdiction, which divests the federal courts of authority to issue divorce, alimony, and child custody decrees), Congress rejected the broad proposal and chose to limit the scope of the statute to "bodily injury" that occurs during ("in the course [of]") or after ("as a result of") crossing a state line. This congressional action removed from federal criminal jurisdiction domestic violence "in interstate commerce" and limited the reach of the provision to violence "in the course or as a result of" interstate travel. This narrowing means that domestic violence occurring before such travel commences—violence that may affect interstate commerce or cause later travel—must be excluded. The prosecution's "single episode" argument is an attempt to create by judicial interpretation the proposed statute that Congress declined to adopt.

The Senate Report accompanying the 1993 version of the provision furnishes further support for Page's interpretation. This proposal employed much of the same language—and the same use of the term "that conduct"—as the final version.[3] The accompanying Senate Report states

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[3]The 1993 Senate bill included a proposed version of § 2261(a)(2) that provided as follows:

that § 2261(a)(2) "covers cases where the defendant has forced a spouse or intimate partner to cross State lines, and injury or abuse occurs during the course of or as a result of *this travel*." S. Rep. No. 103-138, at 61 (1993) (emphasis added). This report also states that the provision "creates a Federal remedy for interstate crimes of abuse including crimes committed against spouses or intimate partners *during interstate travel* . . . ." *Id.* at 43 (emphasis added). This language demonstrates that Congress intended the term "that conduct" to refer to interstate travel and not to conduct occurring before such travel.

The Senate Report's statement that "that conduct" means interstate travel, combined with the substantial narrowing of the statute between 1990 and 1994, demonstrates that Congress intended the statute to require discrete acts of violence, occurring during or as a result of interstate travel, resulting in bodily injury. Congress did not intend for the prosecution to be able to establish

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> CAUSING THE CROSSING OF A STATE LINE.--Any person who causes a spouse or intimate partner to cross a State line by force, coercion, duress or fraud and, in the course or as a result of that conduct, commits an act that injures his or her spouse or intimate partner shall be punished as provided . . . .

S. Rep. No. 103-138, at 20 (1993).

violation of § 2261(a)(2) simply by showing a loose connection between interstate travel and violent acts, occurring before interstate travel, that actually caused the victim's physical injuries. Violence occurring before interstate travel cannot provide a basis for conviction under the statute. To hold otherwise would restore the broad reach of the proposal rejected by Congress in favor of the more limited provision ultimately enacted.

The prosecution contends that its interpretation of the statute is the only sensible one, asserting that Page's construction would so narrow the statute that it would only cover the defendant who "continue[d] to drive with one hand and to hit his victim with the other while they were crossing the state lines." Obviously it is wrong to suggest that the statute only criminalizes acts of violence occurring at the moment a state line is crossed. Rather, it reaches any crime of violence, resulting in bodily injury, that occurs during or as a result of interstate travel induced by force, coercion, duress, or fraud.

III.

The prosecution's second argument is better. It argues in the alternative that even if § 2261(a)(2) requires violent conduct resulting in bodily injury to occur during the interstate travel, Page's conduct meets this standard. Since the jury acquitted Page of kidnapping, the Department maintains that the threats of violence Page allegedly made during the trip from Ohio to Pennsylvania constituted a

"crime of violence" under the meaning of the statute. The prosecution further contends that these threats resulted in "bodily injury" to the extent that they kept Scrivens from receiving medical treatment sooner and aggravated her preexisting wounds. There was testimony that Scrivens was "dripping blood onto the emergency room floor" when she arrived at the hospital several hours after the beating, Tr. at 159-61, J.A. at 215-17, and that she lost a significant amount of blood, which apparently caused her to become unconscious at times during the extended trip. Tr. at 437, J.A. at 335. There was also testimony that Scrivens was so swollen from the delay in getting to the hospital that emergency room personnel had to call an IV specialist team to get an IV into her. Tr. at 175, J.A. at 231. She experienced great pain throughout the trip. Tr. at 437, J.A. at 335.

We are satisfied that threats of violence may constitute a "crime of violence" for purposes of § 2261(a)(2). *See* 18 U.S.C. § 16(a) ("the term 'crime of violence' means . . . an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another"). But the prosecution still must prove that these intentional acts of violence caused bodily injury to defendant's spouse or intimate partner. The statute defines "bodily injury" as "any act, except one done in self-defense, that results in physical injury or sexual abuse." 18 U.S.C. § 2266.

The prosecution argues that the threats of violence allegedly made by Page during the drive to Pennsylvania kept Scrivens from receiving medical treatment for several hours. This delay, the prosecution asserts, caused the above-described aggravation of Scrivens's preexisting injuries—in the form of bleeding and swelling—and therefore resulted in a new "bodily injury" to Scrivens for purposes of § 2261.

We conclude that aggravation of injuries inflicted before travel interstate may constitute a "bodily injury" for purposes of § 2261(a)(2); but, in order to establish violation of the statute, the prosecution still must prove that the defendant's intentional acts during interstate travel caused such aggravation. Where the only bodily harm sustained during interstate travel was the worsening of a prior injury, § 2261(a)(2) requires the prosecution to prove that, during or as a result of interstate travel, the defendant "intentionally commit[ted] a crime of violence and thereby cause[d]" such aggravation. In other words, evidence that injuries inflicted in prior domestic violence were worsened during or as a result of subsequent interstate travel is, without more, insufficient to convict under § 2261(a)(2). The prosecution must also prove that the defendant intentionally committed a violent crime during interstate travel that caused the aggravation of the preexisting injuries.

In the present case, the proof the prosecution presented could sustain a verdict that Scrivens incurred

"bodily injury" as a result of threats of violence made during the several hours of travel to the hospital. But the prosecution did not clearly communicate to the jury the theory that the continuation or aggravation of preexisting injuries may constitute bodily injury for purposes of § 2261(a)(2). Rather, its theory at trial was that Page's beating of Scrivens before travel commenced marked the onset of a "continuing assault" that caused her bodily injuries. Tr. at 665. It presented the alternative theory that swelling and bleeding could constitute distinct injuries to the District Court during arguments regarding the jury instructions, *id.* at 602, but the judge did not instruct the jury on this subject. *Id.* at 716-19. Instead, the court gave a general instruction that included only the language of the statute and some very general definitions for some of the terms employed therein. *Id.* This instruction suggested that injuries inflicted before interstate travel began could provide the basis for a conviction so long as the prosecution showed some connection between the previous violence and interstate travel. *See id.* at 716-19 (discussing the elements of interstate domestic violence); *id.* at 721 (addressing the issues of timing and intent). Because we reject this interpretation of the statute, the jury was not properly charged. We cannot uphold a jury verdict on the aggravation theory in the absence of a proper instruction outlining the elements of the theory, as set out above.

IV.

Relying on *United States v. Lopez*, 514 U.S. 549 (1995), Page argues that if § 2261(a)(2) is interpreted to reach his conduct, it exceeds the power of the federal government to regulate interstate commerce. *Lopez* identified three broad categories of activity subject to federal regulation under the Commerce Clause: (1) the use of the channels of interstate commerce; (2) use of the instrumentalities of commerce; (3) and noncommercial intrastate activity that nevertheless substantially affects interstate commerce. *Id.* at 558-59. Page contends that his conduct falls outside these categories because it constituted noncommercial intrastate activity which had no impact on interstate commerce. Page's argument ignores the prosecution's alternative theory—that § 2261(a)(2) applies to his conduct during interstate travel.

Section 2261(a)(2) criminalizes only domestic violence occurring during or as a result of interstate travel that has been induced by force, coercion, duress or fraud. The Supreme Court has upheld numerous statutes criminalizing conduct that occurs during interstate travel, regardless of whether commercial activity is involved. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255-56 (1964); *Edwards v. California*, 314 U.S. 160, 172 & n.1 (1941); *Caminetti v. United States*, 242 U.S. 470, 491-92 (1917). Relying on this authority, other courts of appeals have rejected similar challenges to different

provisions of the Violence Against Women Act. *See United States v. Wright*, 128 F.3d 1274, 1275 (8th Cir. 1997) (rejecting commerce clause challenge to § 2262(a)(1)); *United States v. Bailey*, 112 F.3d 758, 766 (4th Cir. 1997) (rejecting constitutional challenge to § 2261(a)(1)). Because § 2261(a)(2) requires the government to prove that the domestic violence occurred during or as a result of interstate travel, the provision was validly enacted by Congress under the Commerce Clause and may properly be applied to conduct that satisfies its elements.

V.

Page maintains that the District Court erred in making several evidentiary rulings. First, he contends that the District Court should have admitted evidence of domestic violence complaints filed by Scrivens against Ed Burton, a man with whom she has cohabited and who is the father of one of her children. Page offered one complaint filed each year from 1990 through 1994 and one from September 1995, two months following the incident at issue in this case. Without clearly articulating his reasoning, Page argues that this evidence would have cast doubt on the government's argument that Scrivens was his "intimate partner" for purposes of § 2261(a). He suggests that because Scrivens was Burton's intimate partner, she could not also be his intimate partner. The prosecution concedes that Scrivens was Burton's intimate partner but urges that a person may have more than one intimate partner at a time.

The District Court apparently agreed, concluding that these complaints had very little probative value and were likely to mislead the jury.

The statute defines "spouse or intimate partner" as "a spouse, a former spouse, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited with the abuser as a spouse," and "any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State in which the injury occurred or where the victim resides." 18 U.S.C. § 2266. Under this definition, it is clear that Scrivens is Burton's intimate partner because they share a child. At trial, the government presented evidence that Scrivens was Page's intimate partner at the time of the attack, and Page does not challenge the sufficiency of this evidence. Instead, Page offered the domestic violence complaints to establish that Scrivens is Burton's intimate partner and that Page is not. Nevertheless, the language of the statute clearly allows the victims of domestic violence to have multiple "spouse[s] or intimate partner[s]." For instance, a woman who is divorced is the spouse or intimate partner of both her former and present husbands. Since Burton's status has no bearing on whether or not Scrivens was also Page's intimate partner, the District Court did not abuse its discretion by excluding this evidence.

Page also contends that the District Court should have admitted evidence that Scrivens was convicted of

drunk driving in 1993 and failed to seek treatment for drug and alcohol dependency as required by her probation order. He argues that this evidence was probative of a continuing substance dependency that would have cast doubt on her credibility as a witness and would have corroborated Page's claim that Scrivens was intoxicated and attacked on the night of July 24, 1995. The District Court acted within its discretion in refusing to admit this evidence, which bears little, if any, relevance to the issues in the case and would likely have prejudiced the jury against the victim.

The defendant also argues that the District Court improperly admitted into evidence the self-styled "Release" sent by his former attorney to Scrivens seven days following the incident. The document asked Scrivens to "release[] Derek Page from all claims and rights of action (civil and criminal)" stemming from the events of July 24, 1995, in exchange for payment of $450. Page contends that this document constituted an offer of compromise, inadmissible under Rule 408 of the Federal Rules of Evidence. The prosecution argues that it offered the release for the permissible purpose of proving an element of the kidnapping offense—that Page took Scrivens out of the state to avoid prosecution. Since Page was acquitted of kidnapping, and because the government makes no claim that this document is relevant to the interstate domestic violence charge, we need not pass on the admissibility of the release. For the same reasons, we shall not address

Page's argument that the District Court allowed Page's former attorney to testify regarding the preparation of the release in contravention of the attorney-client privilege.

Finally, Page contends that the District Court misapplied the Sentencing Guidelines in determining his base offense level. In light of our reversal of Page's conviction, we need not address this argument. Nevertheless, we note that the Guidelines have been amended to include a provision for interstate domestic violence. *See* U.S.S.G § 2A6.2 (guideline for interstate domestic violence and stalking, effective November 1, 1997).

VI.

Because the jury was not properly instructed regarding the scope of the offense, we must remand the case for retrial. *See United States v. Palazzolo*, 71 F.3d 1233, 1237-38 (6th Cir. 1995). The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

CONCURRENCE

HARRY W. WELLFORD, Circuit Judge, concurring. I concur in Judge Merritt's well-reasoned opinion to the effect that we must remand this case for retrial because the jury was not adequately instructed as to the requirements of the law under the circumstances of this case.

I would note that in this case, as Judge Merritt's opinion states, "the beating had ceased" when Page coerced Ms. Scrivens into his car in Ohio for a trip to her mother's home in Pennsylvania. I would emphasize that there was no proof in this case that any physical assault or force was applied to Scrivens' body after Page and the victim left his apartment together in Ohio and he placed her in his car. The record reveals the following testimony of Scrivens:

> Q. Am I correct that, from the minute you left the apartment until the time that Derek left you at the hospital in Washington, Pennsylvania, that he did not strike you, hit you, do anything of that nature?

A. Right.

Q. So the injuries that you presented with at the hospital in Washington, Pennsylvania were injuries that you suffered inside that apartment; isn't that true?

A. That's true.

Q. Once you got to the hospital, am I correct that you're in a wheelchair, and somebody some man, white man, showed you down to the emergency room from where you were, where you first came in the hospital?

A. Derek pushed me. He was directing us to the emergency room, and he was pushing me in the wheelchair.

In light of this testimony, there is a serious question as to whether there was sufficient evidence to prove a "crime of *violence*" occurred during or as a result of the car trip. Webster's THIRD NEW INTERNATIONAL DICTIONARY (1966) offers one definition of "violence:" "exertion of any physical force so as to injure or abuse." That same source gives a second definition: "intense,

turbulent or furious action; force." A proper interpretation would require a finding of physical force or intense physical action for conduct to constitute a "crime of violence." The question then becomes whether Page committed some physical offense, some forceful action against Scrivens resulting in additional, separate bodily injury during, or as a result of, the forced crossing of a state line apart from the planned assault which was concluded at Page's Ohio apartment.

The dissent's detailed description of that assault concludes:

> After the beating, Page carried his victim, who was too weak to walk and who had fallen into unconsciousness several times during the attack, and placed her into his car under threat of further violence from his gun. J.A. at 326 (Scrivens Test at 428). Page then drove around for approximately four hours, crossing state lines into Pennsylvania and intentionally passing several local hospitals. . . .

The jury did not find, however, that Page kidnapped the victim. In addition, there was no evidence that Page actually carried a stun gun on the trip into Pennsylvania, much less any evidence that he used it. There was evidence that Scrivens assumed that Page had a stun gun and that she considered the stun gun to be a threat to her safety. Scrivens testified:

> Well, before he took me to the car, he told me, once we get outside I'm not going to make a commotion, because he was patting on his pocket up here. That's where he had that little stun gun at. He asked me would I, you know, whether or not I was going to make a commotion, and I told him no, and he carried to me to the car.

Scrivens was fearful of Page, understandably, during the trip and would have been afraid of him whether or not he issued any threat to her or carried a stun gun. I do not believe, however, that mere oral threats, or even carrying a concealed stun gun without using it, or delaying medical treatment thereby "aggravating the preexisting wounds"--alone or in combination--suffices to constitute a crime of *violence* within the meaning of the statute.

I cannot agree with Judge Moore's view that the initial beating in Ohio would constitute interstate domestic violence because it "enabled" him to force Scrivens to cross state lines later. Nor can I agree that forcing her "to travel interstate under threat of violence" and "preventing her from obtaining medical treatment, thereby causing aggravation of her preexisting injuries" necessarily constitutes interstate domestic violence or a crime of violence under the Act. All violent batterers may have a tendency to flee from the scene of their criminal violence and commission of state offenses, and may cross state lines to accomplish this. Congress has not yet made domestic violence in the home involving a female partner a federal offense, nor has it generally made assault and battery, a very prevalent crime, a federal offense. A logical interpretation of Congress' language in § 2261(a)(2) is that it is directed towards one who coerces a partner to cross a state line and then during this travel or as a result of it intentionally commits a physically forceful act that causes bodily injury to the partner. Judge Moore's reading would add a component--if there were a prior criminal violent act causing bodily injury to the partner prior to causing her to travel interstate--that prior act is part of the "course or result of" the prohibited conduct under this section.

Traditionally, state law has always dealt with the conduct involved in this case. Indeed, such actions involving "domestic relations" has, before the enactment of

the statute in question, been deemed to be a prerogative of the states, not the federal government. In this regard, I note the very recent case of *Brzonkala v. Virginia Polytechnic Inst. and State University*, ___ F.3d ___, Nos. 96-1418, 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997), which discusses the constitutionality of this Act. In *Brzonkala*, the Fourth Circuit reversed the district court and found that the Act passed constitutional muster, finding that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce." *Brzonkala*, 1997 WL 785529, at *18. In reaching that conclusion, the court relied in large part on legislative history. The dissent criticized the majority's view:

> Ignoring entirely the overarching change in Commerce Clause analysis wrought by *Lopez* [514 U.S. 549 (1995)], the majority merely recites several statements from House and Senate committees on the general problem of violence against women and the effect of that violence on the nation economy . . . .
>
> . . .

> The majority's wholesale deference to a committee finding would at least be understandable if that committee had made extensive findings deserving of deference. However, the majority ultimately sustains the constitutionality of the Act literally on the basis of a single sentence appearing in that committee report, which sentence is, itself, entirely conclusory.
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> . . .
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> In short, the majority opinion reads, as intended, as if *Lopez* were never decided, holding for our Circuit, explicitly on the authority of Judge Kravitch's opinion in *United States v. Wright*, 117 F.3d 1265, 1269 (11th Cir. 1997), and implicitly on the reasoning advocated by the dissenting Justices in *Lopez*, that "'*Lopez* did not alter our

> approach to determining whether a particular statute falls within the scope of Congress's commerce Clause authority.'" *Ante* at 36. Indeed, as the majority tacitly acknowledges, with understandable reluctance, it views *Lopez*, the most significant Commerce Clause decision in more than half a century, as an aberration, a case limited in its reach to section 922(q), of Title 18, of the United States Code. See *ante* at 36 & n.13 ("[I]t is unsurprising that 'courts have resisted urgings to extend *Lopez* beyond § 922(q).'" (citations omitted)).

Id. at *26-*29 (Luttig, C.J., dissenting).

This judge believes that, for the reasons stated in the *Brzonkala* dissent, the constitutionality of VAWA is subject to serious question. Page, however, presents no constitutional argument in his brief, and therefore we do not address the issue.

Despite my reservations about the sufficiency of evidence where a perceived threat of violence is alleged to constitute a "crime of violence," I concur that the jury was not properly instructed about the scope of the alleged offense and that the case should be **REVERSED** and **REMANDED**, eliminating the "single episode" theory of prosecution.

CONCURRING IN PART, DISSENTING IN PART

KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part. As a response to the "escalating problem of violence against women" and in recognition of the severe toll such crimes have on our society in terms of "health care, criminal justice, and other social costs," Congress enacted in 1994 the Violence Against Women Act ("VAWA" or the "Act"). S. REP. NO. 103-138, at 37, 41 (1993) (VAWA of 1993). While in enacting the VAWA Congress was particularly concerned with those crimes which disproportionately burden women, the language of the Act's interstate domestic violence provision is gender-neutral, *see id.* at 37, and enforcement has been gender-neutral as well. *See, e.g., United States v. Gluzman*, 953 F. Supp. 84 (S.D.N.Y. 1997) (upholding the

indictment of a wife for the murder of her estranged husband in violation of 18 U.S.C. § 2261).

This interstate domestic violence provision, codified as 18 U.S.C. § 2261(a)(2), makes it illegal for any person to "cause[ ] a spouse or intimate partner to cross a State line . . . by force, coercion, duress . . . and, in the course or as a result of that conduct, intentionally commit[ ] a crime of violence and thereby cause[ ] bodily injury to the person's spouse or intimate partner . . . ." While I agree with the majority that 18 U.S.C. § 2261(a)(2) does not exceed Congress's powers under the Commerce Clause and that this statutory provision criminalizes the forcing of an intimate partner across state lines under threat of violence, whereby bodily injuries are aggravated during the transportation, I write separately to emphasize my disagreement with the majority's opinion in one crucial respect. It is my firm conviction that the language of this statutory provision also reaches the forcing of an intimate partner across state lines where such transportation is integrally related to a prior beating, even if that beating occurs before transportation commences. Because I believe the majority misconstrues 18 U.S.C. § 2261(a)(2) in this important respect, makes distinctions that are not mandated by the statute, and adopts an unnecessarily crabbed interpretation, I must respectfully dissent with respect to Part II and the related aspects of the majority's opinion.

I. FACTS

The facts of this case are not unlike the story of many women who attempt to leave an abusive relationship. Like many of their experiences, Scrivens's relationship with Page started out on fairly blissful terms. Joint Appendix (J.A.) at 302-03 (Scrivens Test. at 395-96). Yet, Page soon became controlling, possessive, and even physically abusive, demanding that Scrivens stop associating with her friends and family, controlling what she could or could not wear or eat, and on one occasion even punishing her disobedience with a stun gun and mace. J.A. at 303-07 (Scrivens Test. at 396-400). In light of the deterioration in their relationship, after less than three months together, Scrivens told Page that she was moving out and ending their relationship. J.A. at 293-95, 310-311 (Scrivens Test. at 376-78, 408-09).

The planned attack against Scrivens took place when she went back to Page's in an attempt to retrieve her belongings, all of which were still in Page's condominium. J.A. at 310-19, 338 (Scrivens Test. at 408-21, 440). Upon Scrivens's arrival at Page's condominium, Page pushed her down and dragged her away from the door when she attempted to leave, and as the majority pointed out, evidence showed that he sprayed her with mace and then beat her with his fists, a claw hammer, and a pipe wrench over the course of several hours. *See* Maj. Slip Op. at 4.

Scrivens also testified that he used a stun gun during the assault. J.A. at 318-21 (Scrivens Test. at 420-23). After the beating, Page carried his victim, who was too weak to walk and who had fallen into unconsciousness several times during the attack, and placed her into his car under threat of further violence from his stun gun. J.A. at 326 (Scrivens Test. at 428). Page then drove around for approximately four hours, crossing state lines into Pennsylvania and intentionally passing several local hospitals on the way even though Scrivens pleaded with him to stop for medical treatment at either Riverside or Ohio State University, two hospitals in the Columbus area. J.A. at 223-24, 324-26, 332 (Scrivens Test. at 167-68, 426-28, 434).

II. STATUTORY SCOPE

Page's conduct, as presented to the jury, falls within the scope of the statutory language of 18 U.S.C. § 2261(a)(2) under at least two theories of liability. The evidence presented to the jury showed that he committed interstate domestic violence both: (1) when he beat his ex-girlfriend over the course of several hours with his fists, a claw hammer, and a pipe wrench and subdued her with mace and a stun gun enabling him to force her across state lines against her will in an attempt to evade the law, and (2) when he forced her to travel interstate under threat of violence, intentionally preventing her from obtaining

medical treatment, thereby causing an aggravation of her pre-existing injuries.

A. "In the Course of": Infliction of Bodily Injury Facilitating the Forcible Transportation of a Victim Across State Lines or the Use of Interstate Transportation to Conceal a Crime of Violence

Unlike the majority, I believe "in the course of . . . that conduct" as used in 18 U.S.C. § 2261(a)(2) refers not merely to the *victim's* narrow act of crossing state lines but more generally to the *batterer's* conduct of causing his victim to cross state lines by force or coercion. Not only is this the most logical reading of the statute grammatically, but the majority's odd construction of 18 U.S.C. § 2261(a)(2) also makes little sense given the reality of the crime and the very reasons why Congress believed federal involvement was necessary in this area that has traditionally been left to the states.

The crime of violence that took place inside Page's condominium — the beating and the use of a stun gun and mace — is precisely what *enabled* Page to force Scrivens to undergo the travel across state lines. The beating subdued his victim, rendered her in no condition to resist him physically as she was being placed into his car, and frightened her so severely that she agreed not to make any "commotion" that might attract attention and aid from

others once they got outside of his condominium. J.A. at 326 (Scrivens Test. at 428). The attack also allowed Page to retain control over Scrivens during the forcible transportation. Not surprisingly, a person who has just been beaten in the manner Scrivens had been is far less physically and emotionally capable of attempting an escape, formulating a method of escape, or eliciting aid from others. The beating was an *integral* part of the forcible transportation since it enabled Page to force Scrivens on an unwilling four-hour journey the destination of which was not revealed to Scrivens until much later. J.A. at 332, 337 (Scrivens Test. at 434, 439). Consequently, the beating that took place inside Page's condominium clearly occurred "in the course of" Page forcibly "causing" Scrivens "to cross State lines."

Furthermore, evidence presented to the jury showed that Page removed Scrivens from the local area precisely because he feared the consequences of his having harmed her and knew that interstate travel would make it more difficult for police authorities to hold him liable for his crime. J.A. at 324-25 (Scrivens Test. at 426-27). It is difficult to believe that Congress intended to exclude from this statute's purview the beating of an intimate partner by a batterer who then forcibly transports his victim across state lines under threat of further violence in order to avoid detection from the law. What is ironic about the majority's

opinion is that the inadequacy of state law enforcement was one of the main reasons for which federal legislation dealing with domestic violence was thought to be necessary. The VAWA was intended to deal with those batterers who carry or force their intimate partners across state lines as part of a domestic violence incident in an attempt to conceal their crimes. *See* Abraham Abramovsky, *Interstate Domestic Violence and Murder: Are They the Same?*, N.Y. L.J., July 12, 1996, at 3. Those who enacted the VAWA's interstate domestic violence provision recognized that batterers were using interstate travel as a loophole in the system of state law enforcement and that crimes of domestic violence "because of their interstate nature, transcend the abilities of State law enforcement agencies." S. REP. NO. 103-138, at 42-43, 62 (1993) (VAWA of 1993). For example, when batterers take their victims across state lines, local authorities often encounter difficulties subpoenaing hospital documents and witnesses from other states. *See* Robert Ruth, *Second Ohio Man Guilty in Federal Violence Cases*, THE COLUMBUS DISPATCH, Apr. 13, 1996, at 3B. The majority's narrow perspective blinds it from the "bigger picture" — from seeing that this incident is precisely the type of situation for which a federal domestic violence statute would be needed and which 18 U.S.C. § 2261(a)(2) was intended to cover.

While the majority discounts the suggestion that its interpretation would limit the reach of 18 U.S.C. § 2261(a)(2) to those rare situations where the batterer is driving with one hand while hitting his victim with the other, the reality is that its interpretation reads a distinction into the statute that is not very logical in light of the nature of domestic violence crimes. Page's crime of violence was committed as much "in the course" of forcing Scrivens across state lines as that of a man who beats his intimate partner while standing in the driveway with one foot in his car, or the man who beats his intimate partner while parked at various highway rest stops. The sad truth about domestic violence is that the batterers may well be intelligent people who appear to the rest of society to be upstanding, respectable citizens. At minimum, these batterers are sufficiently intelligent to realize that their chances of being held liable for the abuse of an intimate partner are dramatically higher when they beat their intimate partners outside on the driveway in front of the neighbors or at rest stops populated twenty-four hours a day, rather than inside the home behind closed doors and drawn curtains. Congress very appropriately entitled Title II of the VAWA, the domestic violence section which contains, as a small part, the interstate domestic violence provision, "Safe *Homes* for Women." S. REP. NO. 103-138, at 43 (1993) (VAWA of 1993) (emphasis added). One reason why our society has taken so long to accept domestic violence as a

crime against society is the fact that it typically does not occur in public places among strangers, but in the privacy of one's own home among intimate partners. *See* Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act after Lopez*, 96 COLUM. L. REV. 1876, 1886 & n.38 (1996). To assume that Congress intended to criminalize only those beatings occurring precisely during travel but not those occurring inside a home that enable the further violence of forcible interstate travel or that are concealed by use of interstate travel would be to suggest that Congress somehow missed the boat.

B. "In the Course of": Aggravation of Injuries During Forcible Interstate Travel

I agree with the majority that forcibly taking an intimate partner whom the batterer has just severely beaten into unconsciousness across state lines thereby causing the aggravation of her injuries is a "crime of violence" causing "bodily injury" to that person in violation of 18 U.S.C. § 2261(a)(2).

The majority correctly points out that one commits a crime of violence not merely when one *actually* uses force, but also when one *threatens* the use of force. In the instant case, the government presented evidence that Page threatened the use of a stun gun against Scrivens's person

in order to obtain her cooperation in being trasported across state lines. Page kept the stun gun in his pocket and made certain Scrivens knew he had easy access to it during the ride. J.A. at 326 (Scrivens Test. at 428). Moreover, while they traveled interstate, Page also threatened to push Scrivers out of the car and to leave her on the side of the road where no one would ever find her. J.A. at 334 (Scrivens Test. at 436). This conduct is, without a doubt, an act of violence both as a matter of logic and as a matter of law.

As for what constitutes the causing of "bodily injury," nowhere does the statute suggest that the bodily injury must be an injury newly inflicted, completely distinct from the prior criminal actions of the batterer. As recognized by the majority, such a limitation would make little sense. Under Judge Wellford's interpretation, Page's actions would not constitute a crime of interstate domestic violence even if Scrivens had bled to death or gone into shock during and as a result of[4] the forcible transportation

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[4]In addition to my disagreement with the majority regarding the interpretation of "in the course of" as discussed in the previous section, I must also object to how the majority equates the term "as a result of" with "after." *See* Maj. Slip Op. at 7. An event (X) that results from another (Y) does not necessarily need to follow it in the sense that the beginning of event X can precede the end of event Y, especially when event Y

simply because the death or shock would not have been "separate" from Page's prior criminal conduct towards Scrivens which occurred before transportation commenced. Yet, there is no relevant distinction between a person who forcibly prevents his intimate partner from obtaining medical care forcing her to bleed to death, a person who forcibly prevents his diabetic intimate partner from obtaining insulin shots forcing her to fall into a coma, and a man who forcibly prevents his intimate partner from obtaining food and water for several days forcing her to suffer renal failure. Any prior criminal actions of any of these batterers should in no way weaken or negate the observation that these three situations are analogous and that in all of these scenarios the batterer has committed a crime of violence causing bodily harm.

We note as well that the seriousness of the bodily injury is not a proper basis for negating criminal liability under 18 U.S.C. § 2261(a)(2). Whether or not one is guilty of interstate domestic violence does not depend on the seriousness of the bodily harm suffered by the victim. The fact that the victim in *United States v. Bailey*, 112 F.3d 758 (4th Cir. 1997), suffered permanent damage does not render

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spans a lengthy period of time as interstate travel might. In other words, a crime of violence does not have to take place after the travel completely ends in order for one to say that the crime of violence was the result of the travel.

Page any less culpable under 18 U.S.C. § 2261(a)(2). The statute clearly shows that the degree of harm inflicted on the victim is instead to be taken into account at the sentencing stage pursuant to 18 U.S.C. § 2261(b).[5]

III. CONSTITUTIONALITY

Because under either of the above interpretations of 18 U.S.C. § 2261(a)(2) the triggering factor is the movement of the victim across state lines, it is clear to me that this statute is a valid exercise of Congress's power under the Commerce Clause to regulate the "use of the channels of interstate commerce."[6] *United States v. Lopez*,

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[5]Title 18 U.S.C. § 2261(b) specifically distinguishes between those situations in which the victim dies, those in which the victim suffers "permanent disfigurement or life threatening bodily injury," those in which the victim sustains "serious bodily injury," and "any other case."

[6]My analysis under the first *Lopez* category should in no way be interpreted as foreclosing either the second or third *Lopez* category as a valid basis for upholding the constitutionality of 18 U.S.C. § 2261(a)(2) under the Commerce Clause. *See Lopez*, 514 U.S. at 558-59 (concluding that Congress is "empowered [secondly] to regulate and protect . . . persons or things in interstate commerce" and finally to regulate "those activities having a substantial relation to interstate commerce"). I have chosen to limit my discussion to this first category simply because this was the focus of the government's arguments

514 U.S. 549, 558 (1995) (describing the first category of activity Congress is empowered to regulate under the Commerce Clause). The Supreme Court recently reiterated the well-settled principle that "the transportation of persons across state lines" is a "form of 'commerce.'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, --- U.S. ---, 117 S. Ct. 1590, 1596 (1997) (citing its prior decisions in *Edwards v. California*, 314 U.S. 160, 172 (1941), and *Caminetti v. United States*, 242 U.S. 470, 491 (1917)). In *Caminetti*, the Court upheld the White Slave Traffic Act of 1910 under which the defendant had been convicted of transporting and causing to be transported a woman across state lines for the purpose of prostitution or debauchery and rejected the argument that the statute exceeded Congress's powers under the Commerce Clause because the purpose of debauchery was unrelated to commerce. *See id.* at 484-85, 488 n.1, 491. Title 18 U.S.C. § 2261(a)(2) is similarly constitutional under the Commerce Clause because the interstate domestic violence provision's requirement of "the crossing of a state line . . . plac[es] the [commission of a crime of violence causing bodily injury] squarely in interstate commerce." *Bailey*, 112 F.3d 766 (analogizing the commission of a crime of violence causing bodily injury to "the debauchery forbade in *Caminetti*"). Any arguably intrastate nature or timing of

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on appeal. Appellee's Br. at 14-15.

the crime of violence is irrelevant, just as it was with respect to the prostitution/debauchery in *Caminetti*.

IV. JURY INSTRUCTIONS

Given my position that either Page's beating of his ex-girlfriend before interstate travel or his subsequent acts of violence during interstate travel, as presented to the jury, could as a matter of law provide a sufficient basis for liability under 18 U.S.C. § 2261(a)(2), I see no error with the jury instructions and likewise no need to remand this case for a new trial.

V. CONCLUSION

I concur with the majority's conclusion that 18 U.S.C. § 2261(a)(2) is a valid exercise of Congress's powers under the Commerce Clause and as well with respect to Part V of the majority's opinion relating to various evidentiary issues raised by the appellant. However, to the extent the majority rejects the view that 18 U.S.C. § 2261(a)(2) reaches those situations where a beating of an intimate partner is integrally related to the subsequent transportation of the victim across state lines by force and to the extent the majority feels it needs to remand this case for a new trial, I respectfully dissent. I would affirm the district court's decision not to overturn the jury's guilty verdict.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SOUTHERN DISTRICT OF OHIO

SENTENCING JUDGMENT AND ORDER

Sixth Circuit Case №. 96-4083
Filed September 24, 1996

Pages E-1 thru E-13

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	:	CR-2-95-146
	:	Judge Dlott
Plaintiff,	:	
v.	:	SENTENCING
	:	JUDGMENT AND
	:	ORDER
DEREK DUANE PAGE,	:	
	:	
Defendant.	:	

The Defendant appeared with counsel, Thomas Tyack, before this Court for sentencing on September 19, 1996.

The Defendant has been adjudged **GUILTY** of:

INTERSTATE DOMESTIC VIOLENCE, a violation of Title 18, U.S.C. §§ 2261(a)(2) and 2261(b), a Class C felony.

Pursuant to 18 U.S.C. § 3553, the Court makes the following findings of relevant facts significant to the imposition of sentence.

The Defendant is guilty of violating Title 18, U.S.C. §§ 2261(a)(2) and 2261(b), which subject the Defendant to a 10 year sentence of imprisonment, a $250,000 alternative fine, no more than 3 years supervised release, and a $50 special assessment on each count. However, United States

Sentencing Guidelines ("U.S.S.G.~) § 2A2.2 determines the sentence in this case.

The record reveals there are a number of objections to the Probation Department's findings of fact and application of the guidelines.

In a letter to the Probation Department dated May 24, 1996, defense counsel outlined roughly twenty (20) objections to the first draft of the presentence report. Approximately fifteen (15) of these objections relate to factual issues regarding the Probation Department's summary of the circumstances surrounding the crime for which the Defendant was convicted.

The Court presided over both trials and is well aware of the facts of this case. None of the Defendant's factual objections are dispositive to the Court's determination of either the offense conduct level or the Defendant's criminal history category. Moreover, under Sentencing Guideline § 1B1.4 a court has tremendous latitude to consider -- without limitation -- any information concerning the background, character and conduct of the defendant, unless prohibited by law. The Court therefore dismisses Defendant's objections relating to the factual circumstances of the offense for which the Defendant was convicted. The Court also agrees with the probation office that -- to the extent that some of defense counsel's objections seek to introduce information regarding the victim's background and lifestyle -- such information is

inappropriate, irrelevant, and has no bearing on the facts of this case.

The Court thus adopts the factual statements contained in the Presentence Report and the Addendum -- subject to the amendments contained in this order -- as its findings of fact. The Court is mindful that some of the report's factual assertions differ from the Defendant's version of what happened on the evening of July 24, 1995. The Court finds it unnecessary to resolve these conflicts as they do not affect the calculation of the Defendant's criminal history category or offense level.

The Addendum to the presentence report indicates that the Defendant has essentially four objections relating to the application of the Sentencing Guidelines. The United States maintains two objections relating to the application of the Guidelines.

After carefully reviewing the submissions of the parties and in light of the evidence adduced at trial, the Court finds as follows:

(1) Choice of Suggested Guideline: Defendant objects to the calculation of the appropriate offense level based on the guideline for Aggravated Assault (U.S.S.G. § 2A2.2). Appendix A to the Guidelines Manual suggests several guidelines sections that may be applied to a violation of 18 U.S.C. § 2261. Under U.S.S.G. § 1B1.2 (a) the Court must choose that guideline section in Chapter 2 which is most applicable to the offense of conviction.

Defendant argues that the guideline most applicable to this case is § 2A2.3 ("Minor Assault").

The evidence adduced at trial showed that the Defendant beat the victim with a hammer and pipe-wrench. Such a beating clearly transcends the boundaries of "minor assault." Moreover, the fact that the majority of the beating took place within the boundaries of Ohio does not affect or mitigate the seriousness of the assault. The Sentencing Guidelines take into account the entirety of a defendant's crime -- rather than isolated segments. Accordingly, Defendant's objection is hereby **DENIED**.

(2) More Than Minimal Planning: The Defendant argues that there was no evidence that the Defendant planned to take the victim in interstate commerce and thus the two point enhancement for more than minimal planning is unjustified.

In United States v. Ivery, 999 F.2d 1043 (6th Cir. 1993), the Sixth Circuit established that there are three situations that warrant an enhancement for more than minimal planning; cases where more planning occurs than is typical for commission of the offense in a simple form; cases involving significant affirmative steps to conceal; and cases involving repeated acts over a period of time, unless each instance was purely opportune.

At least two of these situations are implicated here. First, there was substantial testimony at trial that the Defendant sought to conceal his crime by transporting the

victim to Pennsylvania. There was also testimony that the Defendant took careful steps to lure the victim to his apartment where he had previously planned to attack her. The Court is satisfied that the crime involved more than minimal planning, and that the enhancement is justified.

(3) Use of a Deadly Weapon: The Defendant objects to the enhancement for use of a deadly weapon on the basis that there was no evidence that a deadly weapon was utilized from the time the Defendant and Ms. Scrivens left his apartment until they arrived in Washington, Pennsylvania.

Once again, the Sentencing Guidelines require the Court to consider the entirety of Defendant's conduct in determining his guideline range. Application Note 1(d) under the Commentary at § 1B1.1 defines a dangerous weapon as an instrument capable of inflicting death or serious bodily injury. In this case the Defendant used a hammer and pipe wrench to beat the victim. Both weapons have the potential to cause death or serious bodily injury. Accordingly, the Court finds that the four level enhancement for use of a deadly weapon is appropriate.

(4) Serious Bodily Injury: Finally, the Defendant objects to the enhancement for serious bodily injury on the basis that the victim suffered no injury during the period of transportation in interstate commerce.

This fact, even if true, is irrelevant for purposes of sentencing. "Serious bodily injury" is defined in

Application Note 1(j) of § 1B1.1 as "injury involving extreme physical pain or the impairment of a function of a bodily member, organ, or mental faculty..." There was more than ample testimony in this case from the nurses and physicians at Washington Hospital that the Defendant's injuries involved serious pain and numerous stitches. The Court therefore finds that the 4 level enhancement is justified.

The United States maintains two objections relating to the application of the Guidelines. First, the United States objects to the recommended two point downward adjustment for "acceptance of responsibility" under U.S.S.G. § 3E1.1. The United States contends that the Defendant denied two essential factual elements of guilt: that he and Ms. Scrivens were intimate partners and that he transported Ms. Scrivens across state lines by use of force, coercion, duress or fraud.

District Courts have broad discretion to grant or deny the adduction for acceptance of responsibility. See U.S.S.G. § 3E1.1, comment, (n.5). The reduction is not automatically precluded by a decision to go to trial. U.S.S.G. § 3E1.1, comment (n.2). In rare circumstances, where a defendant goes to trial to assert and reserve issues that do not relate to factual guilt, such as challenging the constitutionality of a statute or it's applicability to his conduct, a defendant may still receive a reduction for

acceptance of responsibility. See. e.g., United States v. Brossard, 987 F.2d 215, 224 (5th Cir. 1993).

In this case the Defendant challenged whether he and Ms. Scrivens fit the statutory definition of "intimate partners." Such a challenge to a statute's application is exactly the kind that the case law has recognized enables a defendant to still receive the reduction for acceptance of responsibility. Had the Defendant's case relied solely on this as a defense the Court would have been inclined to agree with the probation officer's recommendation. However, the Defendant also explicitly denied that he forcibly transported Ms. Scrivens in interstate commerce. Use of force in transporting the victim was a key factual issue in this case, one that the Defendant vehemently denied. Accordingly, the Court cannot agree with the Probation Department that the Defendant has fully accepted responsibility for his actions and finds the United States' objection is well-taken.

Second, the United States objects to the Probation Department's determination of restitution in ¶ 74 of the presentence report. (It is the Court's understanding that this is a typographical error and the United States meant to disagree with the findings in ¶ 76).

The Court agrees that under 18 U.S.C. § 2264(b)(1) restitution must be paid to the victim regardless of other sources of reimbursement. To the extent the presentence

report states otherwise, it is hereby amended to comport with requirements of 18 U.S.C. § 2264.

The proper application of the guidelines, therefore, establishes **25** as the total offense level **I**, as the criminal history category, and **57 to 71** months as the sentencing range.

Since the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment. U.S.S.G. §§ 5C1.1(f).

The Court shall order a term of supervised release when a term of more than 1 year imprisonment is imposed. U.S.S.G. §§ 5D1.1(a) and (b). The authorized term of supervised release in this case is 2 to 3 years. U.S.S.G. § 5D1.2(a)(2).

The maximum fine is $250,000, pursuant to 18 U.S.C. § 3571(b)(3). The Sentencing Guideline range is $10,000 to $100,000. §§ 5E1.2(c)(1) and (c)(2).

A special assessment of $50 is mandatory, pursuant to 18 U.S.C. § 3013.

Under 18 U.S.C. § 2264(a) the Court shall order restitution to the victim of any domestic violence offence. The restitution order may direct the defendant to make a single lump-sum payment or partial payments at specified intervals. 18 U.S.C. § 2264(b)(7). The issuance of a restitution order shall not affect the entitlement of a victim to receive compensation from insurance or any other source until the payments actually received by the victim under the

restitution order fully compensate the victim for the loss. 18 U.S.C. § 2264(b)(9).

Based on the foregoing, the Defendant is sentenced as provided in pages one through eight of this Judgment pursuant to the Sentencing Reform Act of 1984 as follows:

The Defendant is sentenced to the custody of the Bureau of Prisons for a period of **FIFTY-SEVEN (57) MONTHS**. Upon the conclusion of the sentence of imprisonment, the Defendant shall be placed on supervised release for a term of **THREE (3) YEARS**, subject to the following special conditions:

(1) the defendant shall not commit any federal, state or local crime;

(2) the defendant is prohibited from possessing a firearm or other dangerous weapon;

(3) the defendant shall not possess a controlled substance;

(4) within 72 hours of release from custody of the Bureau of Prisons, the defendant shall report to the Probation Office in the district to which he is released;

(5) the defendant shall refrain from the unlawful use of controlled substances and submit to one drug test within 15 days of being placed on Supervised Release, and at least two other periodic drug tests thereafter;

(6) the defendant shall participate in a program of testing and/or treatment for substance abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

(7) the defendant shall attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the Court, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant.

(8) the defendant shall pay restitution to Carla Scrivens in the amount of $7,638.22 which shall be due immediately. Collection of any remaining unpaid restitution will initially be made by way of the defendant's participation in the Bureau of Prisons Inmate Financial Responsibility Program. Any uncollected restitution balance remaining upon the defendant's release from imprisonment shall be paid as a condition of supervised release.

It is ordered that the defendant shall pay to the United States a **SPECIAL ASSESSMENT of $50**, which shall be paid immediately.

The Court finds that Defendant is unable to pay a fine and is likely to become able to pay a fine.

The Court RECOMMENDS to the Bureau of Prisons that the Defendant be incarcerated at a facility as close to Columbus, Ohio, as is possible.

The Defendant is further ORDERED to abide by the following standard conditions of supervised release for the Southern District of Ohio:

(1) the defendant shall not leave the judicial district without permission of the court or probation officer;

(2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support his or her dependents and meet other family responsibilities;

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

(7) the defendant shall refrain from the excessive use of alcohol;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

(9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a_ felony unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court; and

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or

characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Both parties are notified by this Court that they have a right to appeal this sentence. If the Defendant is unable to pay the cost of an appeal, he has a right to apply to this Court for leave to proceed in forma pauperis. If the Defendant is indigent and cannot retain a lawyer, the Defendant may apply and one will be appointed to represent the Defendant on appeal.

Both parties are further advised that, in accordance with the provisions of Rule 4(b) of the Rules of Appellate Procedure, a party wishing to appeal must file a notice of appeal with the Clerk of the United States District Court within 10 days of the filing of this Order.

The Court hereby advises the Defendant that if you so request, the Clerk of this Court will prepare and file forthwith a notice of appeal on your behalf. It is further ordered that the Defendant shall notify the United States Attorney for the Southern District of Ohio within thirty days of any change in resident or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

IT IS SO ORDERED.

/s/ Susan J. Dlott
Susan J. Dlott
United States District Judge

September 24, 1996

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SOUTHERN DISTRICT OF OHIO

ORDER DENYING MOTION FOR
JUDGMENT OF ACQUITTAL

Sixth Circuit Case Nº. 96-4083
Filed July 15, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	:
	:Case No. CR-2-95-146
Plaintiff,	:Judge Dlott
	:ORDER, DENYING
v.	:MOTION FOR
	:JUDGMENT OF
	:ACQUITTAL
DEREK DUANE PAGE,	:
Defendant.	:

This matter is before the Court on Defendant's Motion for Judgment of Acquittal (doe. #51), the United States' Memorandum Contra (doc. #52), and Defendant's Reply Memorandum (doc. #53).

I. BACKGROUND

On November 2, 1995, the grand jury returned a two count indictment charging the Defendant with kidnaping and interstate domestic violence. Defendant's first trial ended in a hung jury. He was retried and acquitted of the kidnaping charge but found guilty of the interstate domestic violence charge. Following the verdict, Defendant submitted this motion for judgment of

acquittal, pursuant to Federal Rule of Criminal Procedure 29(c).[1]

The evidence at trial showed that on the evening of July 24, 1995, the Defendant caused Ms. Carla Scrivens to come to his condominium where he proceeded to beat her with his fists, a hammer and a pipe wrench.[2] Defendant then carried Ms. Scrivens to his car and drove her from Columbus, Ohio, to Washington, Pennsylvania, where he dropped her off in the emergency room of a roadside hospital. The United States presented evidence that the Defendant forced Ms. Scrivens to take this journey and subdued her along the way with threats of further violence and the use of a stun gun.

Through his testimony and cross-examination of the Government's witnesses, the Defendant presented to the jury his theory that he and Carla Scrivens were not "intimate partners" within the meaning of 18 U.S.C. § 2261(a)(2), and that any injury to Ms. Scrivens was not

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[1]The Defendant originally made a Rule 29 motion at the conclusion of the Government's case. At that time the Court denied the motion and submitted the case to the jury.

[2]Defendant conceded that this assault took place, although he disputed the events leading up to the attack and whether the circumstances surrounding it satisfied the elements of the interstate domestic violence, as provided in 18 U.S.C. § 2263(a)(2).

inflicted "in the course or as a result" of traveling in interstate commerce, as required by the statute.[3] This latter contention forms the basis of Defendant's Rule 29 motion presently before the Court.

II. DISCUSSION

The standard for deciding a motion for judgment of acquittal under Rule 29 is "whether the government had introduced evidence sufficient for any rational trier of fact to convict, viewing the evidence and all reasonable inferences in the light most favorable to the government." United States v Gibson, 896 F.2d 206, 209 (6th Cir. 1990).

Defendant was convicted of violating 18 U.S.C § 2261(a)(2), which provides:

> A person who causes a spouse or intimate partner to cross a State line or to enter or leave Indian country by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner, shall be punished as provided in subsection (b).

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[3]Although the Defendant did not testify in the second trial, substantial portions of his testimony from the first trial were read aloud to the jury.

Defendant argues that the assault on Ms. Scrivens took place in his apartment in Columbus, Ohio, and only thereafter did the parties travel in interstate commerce to Pennsylvania. He maintains there was no evidence presented at trial that he assaulted or caused Carla Scrivens any bodily injury during the 3-4 hour trip to Pennsylvania, and thus "there is a failure of sufficient evidence on that critical element of the offense to permit the finding of guilty to stand." Def.'s Mtn. at 3. Defendant further contends that a contrary reading of the statute -- as advanced by the United States -- would render the statute unconstitutional under the commerce clause. In support of this proposition Defendant cites the Supreme Court's recent decision in U.S. v. Lopez, 115 S.Ct. 1624, 1629 (1995).

The United States responds that, as a matter law and statutory construction, the language of the interstate domestic violence statute does not require that injury be inflicted as a person is being transported across state lines. Even if this were a correct interpretation of the statute, the United States argues that evidence was presented to the jury in this case from which a rational trier of fact could find that a continuing assault did occur.

A. Statutory Interpretation

Congress enacted 18 U.S.C. § 2261(a)(2) in 1994 as part of the Violence Against Women Act, which itself was included as part of the 1994 Crime Bill. The statute

allows for federal prosecution of a person who travels across a state line with the intent to injure, harass, or intimidate his or her spouse or intimate partner and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner. 18 U.S.C. § 2261(a). A separate subsection of the statute -- at issue in this case -- also subjects an individual to federal prosecution if he or she causes a spouse or intimate partner to cross a state line by force, coercion, duress or fraud and in the course or as a result of that conduct intentionally commits a crime of violence causing bodily injury. 18 U.S.C. § 2261(a)(2) (emphasis added). The term "in the course of" is not defined within the statute. Moreover, there is no case law interpreting the meaning of this provision. Accordingly, the Court will rely on well-established principles of statutory construction in reaching its conclusion.

When a word or phrase is not defined by statute, it should be construed in accordance with its ordinary or natural meaning. Smith v. U.S., 113 S.Ct. 2050, 2052 (1993); Perrin v. United States, 444 U.S. 37, 42 (1979). According to Webster's Dictionary, when "course" is used in the phrase "in the course of" it means "progress or progression through a series or through a development or a period." Webster's Third New International Dictionary, (unabridged 1981), p. 522. This meaning is broader than

that attributed to the term "during", which is defined as "at some point in the course of." Id. At 703. The United States Sentencing Guidelines also provide some guidance concerning the ordinary definition of the phrase. The guidelines interpret the phrase "same course of conduct" in the following manner:

> Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offences.

U.S.S.G. § 1B1.3, Application Note 9.

Defendant asks this court to interpret the phrase "in the course of" as allowing federal prosecution when bodily injury is inflicted during or after the forced interstate transportation of a spouse or intimate partner, but not before. Def.'s Reply Mem. at 3 ("Such an argument ignores the jurisdictional aspect of the statute requiring that the bodily injury be inflicted during or after causing a spouse or intimate partner to cross a State line.~). The Court finds such an interpretation nonsensical and contrary to the plain meaning of the statute. The Violence Against Women Act is a comprehensive statutory scheme designed to address "the

escalating problem of violent crime against women." S. Rep. 103-138, 103rd Cong., 1st Sess., Violence Against Women Act of 1993, 38 (Sept. 10, 1993). There is no evidence whatsoever that Congress somehow sought to exclude from the Act's protection domestic violence victims who had the misfortune of being beaten before, as opposed to during or after, their transportation across state lines.

The plain meaning of the statute, however, does require there to be a nexus or relationship between the forced interstate transportation and the infliction of bodily injury. The Court finds that there was more than sufficient evidence in this case from which the trier of fact could conclude that the attack on Ms. Scrivens in Columbus, Ohio, and her subsequent transportation to Washington, Pennsylvania, was all part of a single episode or series of events.[4] Ms. Scrivens arrived at the Defendant's home to pick up her clothes and other belongings. The Defendant proceeded to assault her with a hammer and pipe wrench, rendering her unable to walk. The Defendant then helped Ms. Scrivens change her clothes and carried her to his car. He then drove Ms. Scrivens across Ohio into Pennsylvania, eventually

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[4]In light of this conclusion it is not necessary for the Court to address the United States' alternative argument that the trip to Pennsylvania itself exacerbated Ms. Scriven's injuries and caused bodily harm.

leaving her at the emergency room of a hospital in Washington, Pennsylvania. These events transpired in a single evening, over the course of a six to eight hour time period.

B. Validity of the Statute

Defendant also asserts that a statute allowing federal prosection in cases where bodily harm is inflicted before transportation in interstate commerce exceeds the limite of Congress' regulatory authority under the commerce clause. In support of this argument Defendant cites dicta from the Supreme Court's recent decision in Lopez. As a threshold matter, the Court notes that at no time during the trial in this case did Defendant submit a motion challenging the constitutionality of the interstate domestic violence statute. Defendant's argument at this juncture appears to be that while not facially invalid, the statute, as interpreted by the Court, is somehow constitutionally defective. Def.'s Reply Mem. at 7.

The Court believes Defendant misconstrues the nature of the Supreme Court's inquiry under the commerce clause and the Lopez decision. The constitutionality of 18 U.S.C. § 2261(a)(2) under the commerce clause hinges upon whether Congress, in enacting the statute, had a rational basis for concluding that the regulated activity -- domestic violence -- substantially affects interstate commerce. A federal court recently answered this question in the affirmative, and

thus upheld the civil rights section of the Violence Against Women Act in the face of a Lopez challenge. Doe v. Doe, 1996 WL 344026, at *6 (D. Conn. June 19, 1996).

As the Defendant concedes, this issue is not presently before the Court and the Court will not engage in needless and unwarranted constitutional interpretation. For purposes of deciding Defendant's motion, however, the Court finds that interpreting 18 U.S.C. § 2261(a)(2) to permit federal prosecution in cases such as this -- where bodily injury precedes forced interstate transportation of a spouse or intimate partner -- in no way contravenes the limits of Congress' regulatory authority under the commerce clause.

III. CONCLUSION

Defendant's motion for Judgment of Acquittal is hereby **DENIED.**

IT IS SO ORDERED.

/s/ Susan J. Dlott
Susan J. Dlott
United States District Judge

DATE: July 11, 1996

APPENDIX G

UNITED STATES COURT OF APPEALS

18 U.S.C. § 2261

Pages G-1 thru G-2

18 U.S.C. § 2261:

Interstate domestic violence

(a) OFFENSES.—

(1) CROSSING A STATE LINE.— A person who travels across s state line or enters or leaves Indian country with the intent tc injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally conmilts a crime of violence and thereby causes bodily injury to such spouse. or intimate partner, shall be punished as provided in subsection (b).

(2) CAUSING THE CROSSING OF A STATE LINE.— A person who causes a spouse or intimate partner to cross a State line or to enter or leave Indian country by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner, shall be punished as provided in subsection (b).

(b) PENALTIES.— A person who violates this section shall be fined under this title, imprisoned—

(1) for life or any term of years, if death of the offender's spouse or intimate partner results;

(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the offender's spouse or intimate partner results;

(3) for not more than 10 years, if serious bodily injury to the offender's spouse or intimate partner results or if the offender uses a dangerous weapon during the offense;

(4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime or territorial jurisdiction of the United States or in a Federal prison); and

(5) for not more than 5 years, in any other case, or both fined and imprisoned.

APPENDIX H

UNITED STATES COURT OF APPEALS

18 U.S.C. § 2262

Pages H-1 thru H-3

18 U.S.C. § 2262:

Interstate violation of protection order

(a) OFFENSES.—

(1) CROSSING A STATE LINE.— A person who travels across a state line or enters or leaves Indian country with the intent to engage in conduct that—

(A)(i) violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued; or

(ii) would violate subparagraph (A) if the conduct occurred in the jurisdiction in which the order was issued; and

(B) subsequently engages in such conduct, shall be punished as provided in subsection (b).

(2) CAUSING THE CROSSING OF A STATE LINE.— A person who causes a spouse or intimate partner to

cross a State line or to enter or leave Indian country by force, coercion, duress, or fraud, and, in the course or as a result of that conduct, intentionally commits an act that injures the person's spouse or intimate partner in violation of a valid protection order issued by a State shall be punished as provided in subsection (b).

(b) PENALTIES.— A person who violates this section shall be fined under this title, imprisoned—

(1) for life or any term of years, if death of the offender's spouse or intimate partner results;

(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the offender's spouse or intimate partner results;

(3) for not more than 10 years, if serious bodily injury to the offender's spouse or intimate partner results or if the offender uses a dangerous weapon during the offense;

(4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special

maritime and territorial jurisdiction of the United States or in a Federal prison); and

(5) for not more than 5 years, in any other case, or both fined and imprisoned.

APPENDIX I

UNITED STATES COURT OF APPEALS

18 U.S.C. § 2266

Pages I-1 thru I-2

18 U.S.C. § 2266:

Definitions

In this chapter—

'bodily injury' means any act, except one done in self-defense, that results in physical injury or sexual abuse.

'Indian country' has the meaning stated in section 1151.

'protection order' includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary and final orders issued by civil and criminal courts (other than support and child custody orders) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection.

'spouse or intimate partner' includes—

(A) a spouse, a former spouse, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited with the abuser as a spouse; and

(B) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State in which the injury occurred or where the victim resides.

'State' includes a State of the United States, the District of Columbia, a comrnonweajth, territory, or possession of the United States.

'travel across State lines' does not include travel across State lines by an individual who is a member of an Indian tribe when such individual remains at all times in the territory of the Indian tribe in which the individual is a member.

Supreme Court, U.S.
FILED
OCT 13 1999
OFFICE OF THE CLERK

No. 99-97

In the Supreme Court of the United States

DEREK DUANE PAGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The interstate domestic violence statute, 18 U.S.C. 2261(a)(2), subjects to criminal punishment "[a] person who causes a spouse or intimate partner to cross a State line * * * by force, coercion, duress, or fraud and, in the course * * * of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner." The questions presented are:

1. Whether "bodily injury" includes the aggravation of pre-existing injuries during interstate travel.

2. Whether threats of violence constitute a "crime of violence."

3. Whether violence that occurs before interstate travel begins that enables the defendant to force his victim to cross state lines is "in the course * * * of that conduct."

4. Whether Section 2261(a)(2) is constitutional under the Commerce Clause.

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In the Supreme Court of the United States

No. 99-97

DEREK DUANE PAGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the equally divided en banc court of appeals and the concurrence and dissents (Pet. App. A1-A52) are reported at 167 F.3d 325. The now-vacated opinion of the panel (Pet. App. D8-D49) is reported at 136 F.3d 481. The opinion of the district court (Pet. App. F1-F9) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on February 23, 1999. The petition for a writ of certiorari was filed on May 21, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on one count of violating the interstate domestic violence statute, 18 U.S.C. 2261(a)(2). Pet. App. A8. Petitioner was sentenced to 57 months' imprisonment. *Id.* at D12. An equally divided en banc court of appeals affirmed. *Id.* at A1-A52.

1. Carla Scrivens formed a relationship with petitioner and moved into his condominium, in Columbus, Ohio. Their relationship, however, quickly deteriorated. Petitioner demanded that Scrivens stop associating with her friends and family, controlled what she could or could not wear or eat, and once sprayed her with mace and shocked her with a stun gun. After less than three months together, Scrivens told petitioner that she was moving out and ending her relationship with petitioner. Pet. App. A6-A7.

When Scrivens attempted to retrieve her belongings from petitioner's condominium, however, petitioner reacted with violence. He pushed her down, dragged her away from the door, and tried to spray her with mace. He then attacked her with a claw hammer, a pipe wrench, his fists, and a stun gun. During the beating, Scrivens fell into unconsciousness several times, and her feet and legs became so battered that she could not walk. After the beating, petitioner carried Scrivens to his car, placed her inside of it, and threatened her with his stun gun. Petitioner then drove around for approximately four hours, crossing state lines into Pennsylvania. On the way, petitioner passed several local hospitals and ignored Scrivens' pleas that he stop so that she could obtain medical treatment. During that period, Scrivens continued to bleed, and the swelling from her

injuries increased. Petitioner eventually left Scrivens at the emergency room of a hospital in Washington, Pennsylvania, where Scrivens reported the attack and obtained treatment for her numerous injuries. Pet. App. A7-A8.

Petitioner was indicted on one count of kidnaping, in violation of 18 U.S.C. 1201, and one count of interstate domestic violence, in violation of 18 U.S.C. 2261(a)(2). Section 2261(a)(2) provides that "[a] person who causes a spouse or intimate partner to cross a State line * * * by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner, shall be punished" under the statute. 18 U.S.C. 2261(a)(2).

Petitioner's first trial ended in a hung jury. Following a second jury trial, petitioner was convicted on the Section 2261 count, but acquitted of kidnaping. Pet. App. A8. Petitioner moved for a judgment of acquittal on the Section 2261 count, arguing that Section 2261(a)(2) does not reach violence that occurs before interstate travel begins. He also argued that a contrary reading of the statute would take it outside Congress's power under the Commerce Clause. *Id.* at F4. The district court denied the motion. *Id.* at F1-F9. The district court interpreted the statute's prohibition on violence occurring "in the course or as a result of that conduct" to include the beating in the condominium. *Id.* at F4-F8. The district court further held that interpreting the statute to reach such cases "in no way contravenes the limits of Congress' regulatory authority under the commerce clause." *Id.* at F9.

2. A panel of the court of appeals reversed. Pet. App. D8-D49. The panel held that petitioner could not be convicted under Section 2261(a)(2) for violence that

occurred before commencement of interstate travel. *Id.* at D11. The panel concluded that petitioner's threats of violence that resulted in the aggravation of Scrivens' preexisting injuries fell within the ambit of the statute. The panel remanded for a new trial, however, because it concluded that the jury instructions allowed the jury to convict based on violence that had occurred before petitioner and Scrivens began traveling in the car. *Id.* at D19-D22, D27.

Judge Moore filed an opinion concurring in part and dissenting in part. Pet. App. D36-D49. Judge Moore agreed that petitioner could be convicted based on the aggravation of Scrivener's preexisting injuries that occurred during interstate travel. *Id.* at D44-D49. Judge Moore dissented, however, based on her view that petitioner could also be convicted on the basis of the violence that occurred in his condominium. *Id.* at D37-D44.

3. On rehearing en banc, the court of appeals affirmed petitioner's conviction and sentence by an equally divided vote. Pet. App. A1-A52. Judge Moore filed an opinion concurring in the affirmance, in which seven other members of the court joined. *Id.* at A2, A4-A35. She concluded that the "in the course . . . of that conduct" requirement in Section 2261(a)(2) can be satisfied by any violent conduct involved in causing a spouse or intimate partner to cross a state line, not just violent conduct that occurs during interstate travel. *Id.* at A9. Since the beating that occurred in petitioner's condominium "enabled [petitioner] to force Scrivens to travel across state lines," Judge Moore concluded, it "clearly occurred 'in the course' of [petitioner] forcibly 'causing' Scrivens 'to cross a State line.'" *Id.* at A10 (quoting 18 U.S.C. 2261(a)(2)).

Judge Moore concluded that a violation of the statute also occurs when a defendant's threat of violence aggravates injuries that have occurred before interstate travel began. In particular she concluded that "threats" can be a "crime of violence" within the meaning of the statute, and that the "aggravation of preexisting injuries" can constitute "bodily injury" under the statute. Pet. App. A20-A21. Judge Moore concluded that the evidence was sufficient to convict petitioner under that alternate theory, since petitioner's threats "prevented Scrivens from obtaining medical attention and thereby caused her to suffer further injury." *Id.* at A24.

Judge Moore also concluded that Section 2261 is a valid exercise of Congress's powers under the Commerce Clause. Judge Moore noted that this Court has identified three forms of legislation that Congress may enact under the Commerce Clause: (1) legislation that regulates the channels of interstate commerce, (2) legislation that regulates the instrumentalities of interstate commerce, and (3) legislation that regulates intrastate activity that has a substantial effect on interstate commerce. Pet. App. A29. Judge Moore concluded that "[b]ecause the triggering factor of § 2261(a)(2) is the movement of the victim across state lines," the statute "is a valid exercise of Congress's power to regulate the 'use of the channels of interstate commerce.'" *Ibid.* Judge Moore rejected petitioner's argument that, under *United States* v. *Lopez*, 514 U.S. 549 (1995), a criminal statute may validly regulate non-economic activity under the Commerce Clause only if the activity has a "substantial effect" on commerce. Judge Moore concluded that *Lopez* did not extend the "substantial effects" test to Commerce Clause legislation that regulates the channels of interstate commerce. *Id.* at A31-A32.

Judge Kennedy, joined by six other judges, dissented. Pet. App. A2, A36-A43. Judge Kennedy concluded that the requirement that violence occur "in the course . . . of that conduct," could be satisfied by pre-travel violence, but only if the purpose of the violence is to cause interstate travel. *Id.* at A37. Because Judge Kennedy believed that the evidence was insufficient to show that petitioner had beaten Scrivens in order to cause her to cross state lines, Judge Kennedy would not have sustained petitioner's conviction based on his pre-travel conduct. *Id.* at A39-A41.

Judge Kennedy agreed with Judge Moore that the evidence that Scrivens suffered further injuries during interstate travel would support a verdict against petitioner. Pet. App. A42. In her view, however, that theory had not been submitted to the jury. She therefore would have remanded the case for a new trial. *Ibid.* Judge Kennedy also agreed with Judge Moore that the statute is constitutional under the Commerce Clause. *Id.* at A36.

Judge Ryan filed a separate dissenting opinion. Pet. App. A44-A45. Judge Ryan concluded that petitioner's conduct was not encompassed by Section 2261(a)(2), because the violence occurred before petitioner forced the victim to cross a state line. *Id.* at A44. In addition, he would not have affirmed petitioner's conviction based on the aggravation of Scrivens' preexisting injuries because, in his view, that theory of culpability was not presented to the jury. *Id.* at A45. He concluded, however, that the statute is "plainly constitutional." *Ibid.*

Judge Wellford, who joined in Judge Kennedy's opinion, Pet. App. A2 n.2, also filed a separate dissenting opinion. *Id.* at A46-A52. In Judge Wellford's view, the statute only covers cases where the defendant forces a

spouse or intimate partner to cross state lines, and injury or abuse occurs during the course of or as a result of interstate travel. *Id.* at A47. In addition, Judge Wellford concluded that "threats" do not constitute a "crime of violence" within the meaning of the statute, and that "aggravation of injuries" is not a "bodily injury" within the meaning of the statute. *Id.* at A46. Judge Wellford also expressed "skepticism" about the statute's constitutionality. *Id.* at A50-A52.

ARGUMENT

1. Petitioner contends (Pet. 6-16) that the Court should grant review to decide three questions relating to the meaning of Section 2261(a)(2): (1) whether "bodily injury" includes the aggravation of preexisting injuries; (2) whether threats of violence constitute a "crime of violence"; and (3) whether "in the course or as a result of that conduct" refers only to violence that occurs during interstate travel. Review of those issues is unwarranted for three reasons.

First, the court of appeals did not authoritatively resolve any of those three questions. The panel opinion has been vacated, and the equally divided decision of the en banc court has no precedential force. Cf. *Neil* v. *Biggers*, 409 U.S. 188, 192 (1972) (decision of equally divided Supreme Court is not "entitled to precedential weight"). Since none of the opinions issued in this case will have binding effect even within the Sixth Circuit, this case is inappropriate for further review by this Court.

Second, besides the court below, only one other court of appeals has even addressed the issues raised by petitioner, and that decision supports petitioner's conviction here. In *United States* v. *Helem*, 186 F.3d 449, 455 (1999), the Fourth Circuit held that "physical vio-

lence that occurs before interstate travel begins can satisfy the 'in the course or as a result of that conduct' requirement of 18 U.S.C. § 2261(a)(2)." The Fourth Circuit also appeared to accept Judge Moore's conclusion that the statute is violated when a defendant forces a victim to travel across state lines under a threat of violence and thereby exacerbates the victim's preexisting injuries. *Id.* at 454-455. The Fourth Circuit did not resolve that issue, however, because that theory was not presented to the jury. *Id.* at 455. Because only one other court of appeals has addressed the issues raised by petitioner, because that court resolved only one of the questions, and because it resolved that question adversely to petitioner, review of the statutory questions raised by petitioner would be premature.

Third, petitioner's positions on the merits of the statutory issues are incorrect. Petitioner contends (Pet. 8) that threats of violence cannot constitute a "crime of violence" under the statute. Under the terms of the statute, however, a "crime of violence" includes "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 16(a). Here, petitioner "threatened to use a stun gun against Scrivens in order to obtain her cooperation in being transported across state lines. * * * Moreover, while they traveled interstate, [petitioner] threatened to push Scrivens out of the car and leave her on the side of the road where no one would ever find her." Pet. App. A21-A22. As Judge Moore concluded, such threats of physical force constitute a "crime of violence" under Section 2261(a)(2).

Petitioner also errs in contending (Pet. 7-8) that the aggravation of preexisting injuries cannot constitute "bodily injury" within the meaning of Section

2261(a)(2). The statute defines "bodily injury" as "any act, except one done in self-defense, that results in physical injury or sexual abuse." 18 U.S.C. 2266. That definition does not draw any distinction between the infliction of physical injuries by an initial beating and the inflicting of physical injuries by the denial of needed medical care resulting in aggravated injury. In this case, the evidence demonstrated that petitioner's conduct caused Scrivens to lose blood and to experience great pain. Pet. App. A26. As Judge Moore stated (*id.* at A28), "[b]y any definition, the painful swelling and loss of blood that Scrivens suffered as a result of being unable to seek prompt medical attention constituted 'bodily injury.'" *Id.* at A28.

Petitioner similarly errs in contending (Pet. 8-9) that violence that occurs before interstate travel begins cannot satisfy the "in the course or as a result of that conduct" requirement in Section 2261(a)(2). In relevant part, the statute subjects to criminal punishment "[a] person who causes a spouse or intimate partner to cross a State line * * * by force, coercion, duress, or fraud and, in the course * * * of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner." 18 U.S.C. 2261(a)(2). As Judge Moore explained (Pet. App. A9-A10), the words "that conduct" are most naturally read to refer to any conduct that "causes a spouse or intimate partner to cross a State line," and violence that occurs before interstate travel begins can be instrumental in causing that result. In particular, when, as here, pre-travel conduct enables the defendant to force his victim across state lines, the "in the course * * * of that conduct" requirement is satisfied.

The difference between the language of Section 2261(a)(2) and the language in neighboring provisions

confirms the conclusion that Section 2261(a)(2) can encompass pre-travel violence. Sections 2261(a)(1) (interstate domestic violence), 2261A (interstate stalking), and 2262(a)(1)(B) (interstate violation of a protective order), expressly limit coverage to violence or harassment that occurs either "subsequent[]" to interstate travel, or "in the course or as a result of such travel." 18 U.S.C. 2261(a)(1), 2261A, 2262(a)(1)(B) (Supp. III 1997). In contrast, Sections 2261(a)(2) and 2262(a)(2) specifically address violations that involve forcing another person to travel, and both of those Sections refer to "that conduct." 18 U.S.C. 2261(a)(2), 2262(a)(2). As both Judge Moore (Pet. App. A14-A15) and the Fourth Circuit concluded (*Helem*, 186 F.3d at 454-455), that difference in statutory language shows that Congress did not intend to limit the reach of the latter statutes to conduct that occurs during or after interstate travel.

In sum, petitioner's statutory arguments were not authoritatively resolved by the court below, have been considered by only one other court of appeals which rejected them in pertinent part, and are without merit. In the absence of a circuit conflict, petitioner's statutory arguments do not warrant review.

2. Petitioner also seeks (Pet. 16-24) review of the constitutionality of Section 2261(a)(2) under the Commerce Clause. That issue does not warrant review.

a. Contrary to petitioner's contention (Pet. 20), *United States* v. *Lopez*, 514 U.S. 549 (1995), does not cast doubt on the constitutionality of Section 2261. In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q), which made it a federal crime to possess a firearm within 1000 feet of a school. *Lopez*, 514 U.S. at 551. The *Lopez* Court identified three broad categories of activity that Congress may regulate under its commerce power: (1) the

channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come from intrastate activities; and (3) intrastate activities that substantially affect interstate commerce. *Id.* at 559. Since Section 922(q) did not regulate the channels or instrumentalities of interstate commerce, the *Lopez* Court considered whether the statute could be upheld under the third category as a regulation of an activity that substantially affects interstate commerce. The Court concluded that Section 922(q) exceeded Congress's power because it regulated purely intrastate, non-economic activity—possession of a firearm near a school—and did not contain a jurisdictional element requiring a nexus to interstate commerce in each case. *Id.* at 561-562.

Unlike the statute at issue in *Lopez*, Section 2261(a)(2) regulates *inter*state activity. An element of the Section 2261(a)(2) offense is the transportation of the victim across state lines. Accordingly, Section 2261(a)(2) "falls into the first [*Lopez*] category" and "is a valid exercise of Congress's power to regulate the 'use of the channels of interstate commerce.'" Pet. App. A29; see *United States* v. *Bailey*, 112 F.3d 758, 766 (4th Cir.) (rejecting Commerce Clause challenge to Section 2261(a)(2) because "[t]he statute requires the crossing of a state line, thus placing the transaction squarely in interstate commerce"), cert. denied, 118 S. Ct. 240 (1997); *United States* v. *Gluzman*, 953 F. Supp. 84, 89 (S.D.N.Y. 1997) (rejecting constitutional challenge to Section 2261(a)(1)), because "[u]nlike the statute at issue in *Lopez*, section 2261 does not regulate purely local activity, but, instead, is an exercise of Congress' power under the first category of cases articulated by the *Lopez* Court—the authority to regulate the use of

channels of commerce"), aff'd, 154 F.3d 49, 50 (2d Cir. 1998) (adopting the holding and analysis of the district court's opinion), cert. denied, 119 S. Ct. 1257 (1999).

Petitioner contends (Pet. 21-22) that, after *Lopez*, a criminal statute that regulates non-economic activity must substantially affect interstate commerce in order to be a valid exercise of Congress's commerce power, even where that statute contains a jurisdictional element requiring interstate travel. Petitioner's argument is based on a misreading of *Lopez*. The *Lopez* Court found a limitation on congressional power over intrastate activities that are regulated because of their effects on interstate commerce. The Court did not hold that the "substantial effects" test extends to statutes regulating the channels or instrumentalities of interstate commerce. See Pet. App. A31-A32; *Gluzman*, 953 F. Supp. at 89.

No such reading of *Lopez* could be adopted consistent with an unbroken line of this Court's decisions upholding the plenary authority of Congress to regulate the movement of goods or persons across state lines. "[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256 (1964) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917)); see *United States* v. *Orito*, 413 U.S. 139, 144 (1973). Thus, under the Commerce Clause, Congress has the power to regulate any activity—whether commercial or not—that takes places across state lines. See, *e.g.*, *Scarborough* v. *United States*, 431 U.S. 563, 566-567 (1977) (upholding regulation of interstate transportation of firearms for private use); *Orito*, 413 U.S. at 144 (upholding regulation of interstate transportation of

obscene materials for private use); *Cleveland* v. *United States*, 329 U.S. 14 (1946) (rejecting Commerce Clause challenge to the Mann Act, ch. 395, 36 Stat. 825, which forbade transportation in interstate commerce of any woman or girl for the purpose of prostitution, debauchery, or other immoral purpose); *United States* v. *Hill*, 248 U.S. 420, 423-424 (1919) (upholding regulation of interstate travel with one quart of liquor meant for personal consumption); *Caminetti*, 242 U.S. at 491-492 (upholding statute (the Mann Act) criminalizing the defendant's transportation of a woman across state lines to be his mistress). Indeed, in *United States* v. *Robertson*, 514 U.S. 669 (1995) (per curium), a post-*Lopez* decision, the Court confirmed that "[t]he 'affecting commerce' test was developed * * * to define the extent of Congress' power over purely *intra*state commercial activities that nonetheless have substantial *inter*state effects" and does not apply when the regulated activity itself crosses state lines. *Id.* at 671.

b. Petitioner contends (Pet. 17-21) that the views of the judges in this case (Pet. App. A29 (opinion of Moore, J.), A36 (opinion of Kennedy, J., dissenting), A45 (opinion of Ryan, J., dissenting)), and of the Second Circuit in *Gluzman*, 154 F.3d at 50, that Section 2261 is a valid exercise of Congress's power under the Commerce Clause conflicts with the Fourth Circuit's decision in *Brzonkala* v. *Virginia Polytechnic Inst.*, 169 F.3d 820 (1999) (en banc), cert. granted *sub nom. United States* v. *Morrison*, No. 99-5, and *Brzonkala* v. *Morrison*, No. 99-29 (Sept. 28, 1999). There is, however, no such conflict. In *Brzonkala*, the Fourth Circuit held unconstitutional Title III of the Violence Against Women Act of 1994, 42 U.S.C. 13981, which creates a private cause of action against an individual who commits a gender-based crime of violence. *Brzonkala* does

not involve the constitutionality of Section 2261, and the decision in that case does not call its constitutionality into question.

Section 2261 and Section 13981 raise significantly different issues under the Commerce Clause. Section 2261 expressly regulates "an interstate activity, namely the travel across state lines to commit domestic violence." *Gluzman*, 953 F. Supp. at 89 n.3. Section 13981 is not so limited. Nor does Section 13981 contain a jurisdictional element requiring a nexus to interstate commerce in an individual case. The validity of Section 13981 under the Commerce Clause thus depends on whether Congress permissibly determined that the provision regulates an activity that substantially affects interstate commerce. Indeed, in *United States* v. *Bailey*, *supra*, the Fourth Circuit explicitly held that Section 2261(a)(2) is constitutional under the Commerce Clause, reasoning that "[t]he statute requires the crossing of a state line, thus placing the transaction squarely in interstate commerce." 112 F.3d at 766. The same court's en banc decision in *Brzonkala* did not disturb that ruling. Accordingly, there is no circuit conflict on the constitutionality of Section 2261. For the same reason, there is no reason to hold the present case pending the outcome of the decisions in *United States* v. *Morrison*, No. 99-5, and *Brzonkala* v. *Morrison*, No. 99-29.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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